TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 40

FRANK A. MUNSEY, PLAINTIFF IN ERROR,

vs.

WESLEY WEBB, ADMINISTRATOR OF THE ESTATE OF SAMUEL T. PENNINGTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 12, 1911.

(22,731)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 30, 1913.

1 In the Court of Appeals of the District of Columbia.

No. 2251.

FRANK A. MUNSEY, Appellant,
vs.
WESLEY WEBB, Adm'r, &c.

Supreme Court of the District of Columbia.

At Law. No. 51169.

WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington, Plaintiff,
vs.
FRANK A. MUNSEY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceeding had in the above-entitled cause, to-wit:

Declaration.

Filed Nov. 30, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 51169.

WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington, Plaintiff,
vs.
FRANK A. MUNSEY, Defendant.

The plaintiff, Wesley Webb, administrator of the estate of Samuel T. Pennington, deceased, duly appointed such administrator by the County Court of Carter County, in the State of Kentucky, and who now here brings his letters of administration in that behalf, by his attorney, Arthur Peter sues the defendant, Frank A. Mun-
2 sey, for that the defendant heretofore on to-wit: the 15th day of June, in the year of our Lord 1908, was operating, managing and controlling a certain office building, known as the Munsey Building, located on Pennsylvania Avenue, north, between 13th and 14th streets, West, in the City of Washington, in the Dis-

trict of Columbia, and amongst other things was engaged in carrying on the business of renting rooms, suites of rooms and offices in said building to sundry persons, and for the convenience of its tenants and of the employees of the said tenants, the defendant maintained and operated certain passenger elevators in the said Munsey Building, which it habitually invited its said tenants and their employees to use for the purpose of being carried to and from the floors of said building upon which the rooms and suites of rooms and offices of its said tenants were respectively situated, and that on the day and year aforesaid, the United States of America was the lessee of the defendant of certain office rooms in the said building on the seventh and eighth floors thereof, and that on the day and year aforesaid, plaintiff's intestate was an employee of the United States of America as a clerk in the Treasury Department at and for a salary of nine hundred dollars per annum, and for that on the day and year aforesaid it became proper and necessary for the plaintiff's intestate in the performance of his duties as an employee of the United States of America as aforesaid, to go to said office rooms on said seventh floor rented as aforesaid by the United States of America in said building, and for the purpose of going to said office rooms so as aforesaid leased by the United States of America, the plaintiff's intestate had occasion to and did enter one of the said elevators of the said defendant at the first floor of said building with its knowledge and consent and by its invitation, for the purpose of being carried to the said offices of the United States of America on the seventh floor of said building, and it then and there became and was the duty of the defendant to keep and have its said elevator in a reasonably safe and proper condition and in charge of a person of competent skill and care and to operate the same with prudence, care and skill and with due regard to the safety of the plaintiff's intestate, as of other similarly situated, but the plaintiff avers that in violation of its duty in that regard the defendant negligently and carelessly suffered and permitted its said elevator to then and there be in an unsafe and improper condition, and negligently and carelessly then and there operated, managed and controlled said elevator by an employee or agent who was without competent skill, ability and knowledge, and negligently and carelessly by said employee or agent operated, managed and controlled said elevator, whereby the plaintiff's intestate while upon said elevator as aforesaid fell or was thrown or precipitated to and upon the floor or sides of said elevator and was crushed and mortally wounded and injured and from said mortal wounds and injuries on the day and year aforesaid, in the District aforesaid, died; that the said accident *from* the plaintiff's intestate did not result from any fault or negligence of him the said plaintiff's intestate, but from the wrongful acts, neglect and default of the said defendant as aforesaid, and the said plaintiff's intestate could have main-

3 tained an action and have recovered damages therefor had he not been killed as aforesaid, and the plaintiff says that the said intestate left surviving him a widow Ella Pennington, who was wholly dependant for support upon plaintiff's intestate and as his only next of kin the following, Ida B. Pennington, Eliza E. Pen-

nington, Leonidas A. Pennington, all of whom are adults, Jolly J. Peanington, Roy H. Pennington, Flossie A. Penning- and Grace I. Pennington, the last four of whom are minors and all seven of whom are brothers and sisters of the said intestate, and that plaintiff's intestate was employed as aforesaid at the salary aforesaid and that through the death of the plaintiff's intestate as aforesaid the said Ella Pennington was left practically destitute, and that the plaintiff administrator as aforesaid, has been damaged to the amount of ten thousand dollars by reason of the death of the plaintiff's intestate as aforesaid.

Wherefore, the plaintiff brings this suit and claims the sum of ten thousand dollars besides costs.

2. The plaintiff, Wesley Webb, administrator of the estate of Samuel T. Pennington, deceased, duly appointed such administrator by the County Court of Carter County, in the State of Kentucky, and who now here brings his letters of administration in that behalf, by his attorney, Arthur Peter, further sues the defendant, Frank A. Munsey, for that the defendant heretofore on to-wit; the 15th day of June, in the year of our Lord 1908, was operating, managing and controlling a certain office building, known as the Munsey Building, located on Pennsylvania Avenue North, between 13th and 14th streets West, in the City of Washington, in the District of Columbia, and amongst other things was engaged in carrying on the business of renting rooms, suites of rooms and offices in said building to sundry persons, and for the convenience of its said tenants and of the employees of the said tenants, the defendant maintained and operated certain passenger elevators in the said Munsey Building, which it habitually invited its said tenants and their employees to use for the purpose of being carried to and from the floors of said building upon which the rooms and suites of rooms and offices of its said tenants were respectively situated, and that on the day and year aforesaid, the United States of America was the lessee of the defendant of certain office rooms in the said building, and that on the day and year aforesaid, plaintiff's intestate was an employee of the United States of America as a clerk in the Treasury Department at and for a salary of nine hundred dollars per annum and for that on the day and year aforesaid it became proper and necessary for the plaintiff's intestate in the performance of his duties as an employee of the United States of America as aforesaid, to go to said office rooms rented as aforesaid by the United States of America in said building and for the purpose of going to said office rooms so as aforesaid leased by the United States of America, the plaintiff's intestate had occasion to and did enter one of the said elevators of the said defendant with its knowledge and consent and by its invitation, for the purpose of being carried to the said office of the United States of America, and it then and there became and was the duty of the defendant to keep
4 and have its said elevator in a reasonably safe and proper condition and in charge of a person of competent skill and care and to operate the same with prudence, care and skill and with due regard to the safety of the plaintiff's intestate, as of others similarly situated, but the plaintiff avers that in violation of its duty in

that regard, the defendant negligently and carelessly suffered and permitted its said elevator and the appliances for operating and controlling the same to be in an unsafe, dangerous and improper condition, and negligently and carelessly constructed and maintained said elevator at too great a distance from the grill work, casement or walls which surrounded the same, and negligently and carelessly then and there operated, controlled and managed said elevator by a careless, reckless and unskillful employee or agent, which said employee or agent negligently and carelessly operated, managed and controlled said elevator and negligently and carelessly left open the inner door with which said elevator was provided, as aforesaid, fell or was thrown or precipitated to and upon the floor or sides of said elevator and between said floor or sides and the grill work, casement or the walls which surrounded the same, and the defendant negligently and carelessly then and there failed to use reasonable diligence to stop said elevator by reason of all of which the skull, jaw, neck, collar bone and shoulders of plaintiff's intestate were fractured, broken, crushed, injured and wounded, and the plaintiff's intestate crushed, mortally wounded and mortally injured and by reason of all of which on the day and year aforesaid, in the District aforesaid, plaintiff's intestate died; that the said accident to the plaintiff's intestate did not result from any fault or negligence of him the said plaintiff's intestate, but from the wrongful acts, neglect and default of the said defendant as aforesaid, and the said plaintiff's intestate could have maintained an action and have recovered damages therefor had he not been killed as aforesaid, and the plaintiff says that the said intestate left surviving him a widow Ella Pennington, who was wholly dependent for support upon plaintiff's intestate and as his only next of kin the following, Ida B. Pennington, Eliza E. Pennington, Leonidas A. Pennington, all of whom are adults, Jolly J. Pennington, Roy H. Pennington, Flossie A. Pennington and Grace I. Pennington, the last four of whom are minors and all seven of whom are brothers and sisters of the said intestate, and that plaintiff's intestate was employed as aforesaid at the salary aforesaid and that through the death of the plaintiff's intestate as aforesaid the said Ella Pennington was left practically destitute, and she and the said Ida B. Pennington, Eliza E. Pennington, Leonidas A. Pennington, Jolly J. Pennington, Roy H. Pennington, Flossie A. Pennington and Grace I. Pennington and the plaintiff, administrator as aforesaid, have been damaged to the amount of ten thousand dollars by reason of the death of the plaintiff's intestate as aforesaid.

Wherefore, the plaintiff brings this suit and claims the sum of ten thousand dollars besides costs.

ARTHUR PETER,
Attorney for Plaintiff.

5 The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof, otherwise judgment.

ARTHUR PETER,
Attorney for Plaintiff.

Defendant's Plea.

Filed Feb. 20, 1909.

* * * * * * *

Now comes the defendant and for plea to the declaration filed in the above entitled cause, and each and every count thereof, says, that he is not guilty in manner and form as therein alleged.

WILTON J. LAMBERT,
DOUGLAS, BAKER & SHERRILL,
Attorneys for Plaintiff.

Joinder in Issue.

Filed Feb. 25, 1909.

* * * * * * *

The plaintiff joins issue upon the defendant's plea.

ARTHUR PETER,
Attorney for Plaintiff.

Memorandum.

June 9, 1910.—Verdict for Plaintiff for $7500.00.

Supreme Court of the District of Columbia.

FRIDAY, *June 24th*, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

Upon consideration of defendant's motion for a new trial filed herein, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein the sum of Seven Thousand Five Hundred Dollars ($7500.00) with interest from this date together with costs of suit to be taxed by the Clerk and have execution thereof.

From the foregoing judgment, the defendant by his attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia; whereupon the penalty of a bond to operate as a Supersedeas is hereby fixed in the sum of Ten Thousand Dollars.

6

Memoranda.

July 19, 1910.—Appeal bond filed.

Sept. 27, 1910.—Time in which to settle Bill of Exceptions and file transcript extended to Nov. 15, 1910, inclusive.

Supreme Court of the District of Columbia.

MONDAY, *October* 31*st*, 1910.

Session resumed pursuant to adjournment, Hon. Job Barnard, Justice, presiding.

* * * * * * *

The Court having this day signed the bill of exceptions heretofore submitted herein, it is ordered that the same be and hereby is ordered of record as of the time of the noting thereof at the trial.

Further upon motion of defendant by his attorney of record and the consent thereto of plaintiff by his attorney of record, the time within which to file a transcript of the record herein in the Court of Appeals of the District of Columbia, is hereby extended to and including the 1st day of December, 1910.

Bill of Exceptions.

Filed Oct. 31, 1910.

* * * * * * *

Be it remembered, that on the 6th day of June, 1910, before Hon. Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, and a jury regularly empanneled, the above entitled cause came on to be heard on issues regularly joined between plaintiff and defendant.

Whereupon plaintiff, by his counsel made an opening statement to the jury and said in part as follows:

"We expect to show to you that this elevator, as one witness may express it was a 'hoodoo' elevator; We expect to show to you that on numerous occasions prior to this accident this specific elevator had been accustomed, without rhyme or reason, to fall. We expect to show to you that there were two men employed there, one as superintendant, and the other as an elevator boy, and that they were brothers. We expect to show to you that prior to this accident the elevator boy, who was the brother of the superintendant, complained to him that it was not a brotherly act to keep him on the hoodoo elevator, and that he was taken off that elevator and somebody who was not the brother of the superintendant put there.

We expect to prove to you that the elevator next to this one was also accustomed to fall, and that a man was more or less
7 injured a short time before this accident in that elevator. We expect to show to you, gentlemen, that that elevator——

Mr. DOUGLAS: If your Honor please, I object to the last statement made by counsel. It is utterly irrelevant, and something that ought not to be stated to the jury. He will not be permitted to prove it on the trial of the case.

Mr. PETER: What statement is that?

Mr. DOUGLAS: Your statement as to some other elevator in that

building. In other words, your statement is to the effect that you expect to put these elevators on trial from the time that they were put there down to the present time.

Mr. PETER: Since I am able to prove the accident on the specific elevator, if counsel objects to accidents on the adjoining elevator, I will withdraw that statement.

The COURT: Very well.

Mr. DOUGLAS: If the Court please, I think the injury has been done. Counsel has undertaken to arraign, so to speak, these elevators generally. He has made a statement going to show prior accidents on the elevator itself, without any statement that he is going to connect it up with the injury that happened to Mr. Pennington, and he also made a statement with reference to the other elevator that could not possibly have any connection with this accident. We feel, therefore, that the injury has been done, and I move your Honor to discharge the jury.

Mr. PETER: I have already stated that if Mr. Douglas objects to that remark——

Mr. DOUGLAS: The injury has been done.

Mr. PETER (continuing): I withdraw it, and I request your Honor to instruct the jury that they are to pay no attention to anything that is said in respect to the adjoining elevator.

Mr. DOUGLAS: Your Honor will see that there has been no excuse given by Mr. Peter for making this statement. There is no claim that there is any connection with these two elevators, and I submit to the Court earnestly that, his statement having been made, any withdrawal of it cannot withdraw the effect of it. A man is human, he is a human being, whether he is on the jury or off the jury. Now it has gone forth to this jury the general charge and general indictment that these elevators are wrong, and it is hard to eliminate that from the mind of any one. I think the only proper course is to discharge the jury. Your Honor well remembers another elevator case that took place in this court, in which a remark, which could not have been as far reaching as this, was made, in the Holtzman case, and the Court of Appeals held that it was the proper thing to discharge the jury.

The COURT: The jury is well advised as to those matters. It has been advised several times that opening statements are no part of the case, except for the purpose—and I tell you gentlemen now—that opening statements are no part of the case, and have no bearing on the case at all, except to indicate to the jury the character of case and character of proof that is expected to be deduced to prove what the attorneys said in his opening statement. Now, whatever
8 he has said about an accident happening to some other elevator, whether in this building or some other building, has not a thing in the world to do with this case, as we see it now. If I did not feel that you understood that, I perhaps might be constrained to dismiss you from the consideration of this case, but you have been advised in that regard. (I think it happened once before) that no matter what counsel says it is only to indicate what I have stated. It is an impossibility in advance to warn counsel in their

opening statements, and that is so in this case. Now, Mr. Peter has withdrawn that; he cannot prove it; he would not be permitted to prove it; and consequently you have no concern whatever in the world with any accident that may have happened to this or any other elevator, except the accident that happened upon the elevator on this particular occasion. With any other elevator, you have no concern whatever. I think you should not be dismissed from this case now, because you will not consider anything that has been said about any other elevator, and will not consider anything at all which is said by counsel except that which can be proved. You have already been advised on this once before, and I shall overrule the motion.

Mr. DOUGLAS: Your Honor will allow us an exception."

Thereupon defendant by his counsel duly excepted, and exception was duly noted by the Justice in his minutes.

Whereupon the plaintiff, to further maintain the issues on his part joined, produced CLARENCE H. PEAKE, who being first duly sworn, testified in substance, as follows: That he is 21 years of age; that he was employed as an elevator conductor in the Munsey Building in the District of Columbia on the 15th day of June, in the year 1908; that an accident happened in an elevator in that building on the 15th day of June, 1908, at which time he was 19 years old; that the accident happened in this way: Mr. Pennington and another gentleman entered the elevator at the first floor. The other gentleman got off at the second floor. Witness closed the door and started up—he passed the third and fourth floors and was between the fourth and fifth when Pennington reeled and fell backward and was caught between the floor and the elevator; that there is a space of, he judges four or five inches between the grating on the fourth and the fifth floor. Pennington was caught just below the fifth floor; that when he became aware Pennington was about to fall, he released the lever with his right hand and threw his left hand in an effort to stop him from falling. That when the lever is released, it goes to the center; that he could not have carried it past the center without a stop in the center and holding it there, of say a fraction of a minute in order to give the motor down stairs time to stop; that you could carry the lever over from ascending to descending, without letting it stop but it would burn the fuse out; he thinks it is downstairs; and the elevator will be of no use until the electrician fixes it; that it happened that way several times before; that he did not know whether there was an emergency switch on the elevator or not; knew there was a light switch
9 but he could not say positively whether there were two knobs below the lever or not. That he had been working there about seven and a half months before this accident happened; worked there about a month or a month and a half after the accident. He used the light knob but as to the other one, he does not know. That no one instructed him as to the use of the emergency switch; that he was just below fifth floor when Pennington started to fall, cannot say positively how far below fifth floor; about a foot below the fifth

floor he should judge, something like that; maybe a little over; could not have been over a foot and a half, means from the beginning of the concrete, the ceiling of the fourth floor, when he says the fifth floor, which ceiling is about one and a half feet and he was some below that when Pennington started to fall, he judges very near a foot.

Q. Now, just describe the position of your arms from the time the elevator started to ascend until after the accident—both arms. A. The right hand was on the lever from the ground, starting at the first floor. My left was across the door, I judge, I can't say positively. After the man got out at the second, I can't say whether my arm was across the door or not. I don't think it was. There was only one man in the elevator.

Q. Let me see if I understand you. To the best of your recollection, your left arm was across the door until the man got out at the second floor; is that right? A. To the best of my recollection; yes, sir.

Q. And then, to the best of your recollection, after he got out, your arm was not across the door. A. To the best of my recollection, I do not know. I can not say positively whether it was or not.

Q. Mr. Peake, did you not just say that you were not positive, but that to the best of your recollection, that your arm was across the door until the man got out at the second floor, and that after that you are not positive, but that to the best of your recollection your arm was not across the door? A. My arm might have been across the door after the man got out at the second floor, and then unconsciously dropped to my side, I don't know.

Q. Now, then, to your best recollection, where was your left arm just when Mr. Pennington started to fall? A. At my side.

He has no idea of the distance between the fourth and fifth floors; that the elevator speeds are half speed and full speed; that in order to start the elevator you carry it to half speed; that there is no intermediate speed between stopping and half speed, that there is no intermediate speed between half speed and full speed; that at the time Pennington started to fall the elevator was going at full speed; cannot say positively at what point he put on full speed; that full speed is twice as fast as half speed; that there was a collapsible inside door on the elevator at the time of the accident, on the elevator car itself, that at the time of the accident the door was not across, it left the door open—the door was open; cannot say whether there is any way the accident could have happened if the inside door had been closed instead of open.

10 Q. At the time of the accident, this floor that you say projected about three inches, and the under surface of which Mr. Pennington's head came in contact with—was it at an angle or did the wall sit out, just like that (indicating)? Was there anything below the wall in the nature of a fender?

Mr. DOUGLAS: We admit there was not.

* * * * * * *

That after the man's head was caught between the floor of the elevator and the wall and the floor of the building witness climbed

out on the fifth floor and went down and got the electrician, who lowered the car; did not use the emergency switch when Pennington started to fall; he had no knowledge as to the emergency switch.

Upon cross examination the witness testified in substance as follows:

That Pennington was the only passenger in the elevator at the time; that he was standing on the witness' left and about midway back in the car; that witness had not noticed anything wrong with him; that the elevator gave no jolt or anything that might possibly have caused Pennington to fall and was running smoothly between the fourth and fifth floors when he fell; that witness' right hand was holding the lever and his left either by his side or up against the wall, that to the best of his recollection he did not have it there; that when Pennington fell the first thing witness noticed was Pennington's arm coming towards him; that witness put his left arm out, just threw it out, in an effort to stop him and made every effort he could to stop his fall; that he released the lever the moment he saw Pennington falling; that it stopped the elevator within four or five inches; that witness did everything in his power to stop the elevator; that it was close to the concrete floor when it did stop; that there was an ordinary iron grill door on each floor which witness closes upon going up; that he judges there is a distance of about one and one-half inches between the floor of the elevator and the floor of the building when the car is level with the floor; that the distance between the elevator and the wall below the floor is about two and one-half or three inches more than when on a level with the floor; that the building and elevator were both new; that witness had never been instructed to use the collapsible door; but judges it was used when there was a large crowd in the elevator; over the objection of counsel for the plaintiff, that there was no other use for it except when there was a crowd on there, when people might be jammed in that direction; that the floor of the elevator was in good condition and there was nothing in there over which a man might fall.

Q. You had no warning that he was sick, or anything of that sort? A. No, sir.

Q. Do you know what caused him to fall? A. I have no idea. I judge it was vertigo——

Mr. PETER: I ask that that be stricken out.

Mr. DOUGLAS: Yes, that is all right.

The COURT: Strike out what?

11 Mr. DOUGLAS: I asked him if he knew what caused the fall, and he said he did not know, but he judged it was vertigo.

Nearly all of the aforegoing cross-examination of Peake was obtained by the witness answering "yes" to leading questions asked by counsel for defendant.

Upon re-direct examination witness testified in substance as follows:

That he is right-handed, but uses his left hand as much as his right except in writing; that when his hand *is* extended across the

door of the elevator he caught hold of the space in the grating and could get a good grip; that he could not say whether the paint was worn off the grating from continued use by the elevator boys in keeping their hands there, because he never noticed; that the number of times his hand would be on the grating would vary according to the crowd that was in the elevator; that it was there quite often in the afternoon when the Government clerks came down; that he is not positive what distance the elevator went after Pennington started to fall; that there was a rubber mat on the floor of the elevator, which was not new but was worn.

Upon re-cross examination witness further testified in substance as follows:

By the COURT:

Q. I understood you to say that you do not know what made him fall? A. What made him fall?

Mr. PETER: I did not understand your Honor's question.

The COURT: I said I understood him to say that he did not know what made him fall.

A. I do not know what made him fall. I think at the Coroner's Inquest there was vertigo——

"Mr. PETER: It was not developed at the Coroner's Inquest. In fact, all the evidence at the Coroner's Inquest was to the contrary.

Mr. DOUGLAS: Now, I move that the jury be discharged, on the ground that counsel has stated what took place at the Coroner's Inquest and knows what took place there.

The COURT: What Mr. Peter has said does not give me any information, and I presume it does not give the jury much information. I simply asked this witness this: 'I understand you to say you do not know what made this man fall?' and he said, 'No; it was developed at the Coroner's Inquest—and then Mr. Peter broke in.

Mr. DOUGLAS: Mr. Peter broke in and said that something else developed at the Inquest.

Mr. PETER: The witness said something about vertigo, your Honor. He got 'vertigo' out again.

The COURT: Well, I did not hear him.

Mr. LAMBERT: He got out 'vertigo' and Mr. Peter objected.

Mr. PETER: I ask your Honor to instruct the jury that neither what the witness said nor what counsel said about vertigo has anything to do with this case, and that they are to disregard it.

Mr. DOUGLAS: I renew my motion to discharge the jury.

12 Mr. Peter has made a statement here, not as a witness in this case, as to what was the result of the examination into the cause of death at the Coroner's Inquest.

The COURT: Inasmuch as I did not hear what the witness said, and could not have known of it if counsel had not told me in a discussion before the court, I assume the jury has not any better hearin than I have; and I overrule the motion.

Mr. DOUGLAS: I reserve an exception.

The COURT: I will say to the jury as I have before, that this witness does not know and has no right to state what occurred at the Coroner's Inquest and, of course, Mr. Peter has no right to make any statement in regard to it.

Mr. PETER: I will ask your Honor to instruct the jury to disregard both what the witness said and what I said.

The COURT: I have already instructed them; but I hope I will not have any necessity to do so again.

Mr. PETER: Your Honor, this witness has been told by your Honor that the subject of vertigo was not for him, and yet he again comes in with vertigo; and I submit that, although it perhaps was not strictly within my right to have made that statement, yet there was a great deal of provocation when, after the court has told the witness he cannot state what has happened; he insists on doing it.

Mr. DOUGLAS: Your Honor has administered no rebuke to this witness in that respect. When he said "vertigo" before, my friend objected to it and I said of course it could be stricken out. I would like to reserve an exception to your Honor's ruling."

(Which exception was allowed by the Justice, who then and there noted said exception in his minutes.)

Thereupon further to maintain the issues on his part joined, the plaintiff produced LARKIN W. GLAZEBROOK, who being first duly sworn on oath, testified in substance as follows:

That he is the Deputy Coroner of the District of Columbia and had been so since 1893; that he was a physician and surgeon and had been such since 1890; that he made a post mortem examination of Pennington's body at the morgue shortly after the accident; that the right knee of Pennington's trousers was dusty; that the face and neck of Pennington were crushed beyond recognition, and the head and neck between the eye and collarbone were crushed and smashed; that there was no apparent injury on the top of the head; that these injuries were more than sufficient to have caused death; that he performed a complete autopsy on the body and examined the brain and heart and every organ in the body and found all the organs to be in normal condition and he attributed this man's death to this crushing out of the lower part of his skull, his face and neck, and the hemorrhage which resulted from such injuries.

Upon cross-examination witness testified in substance as follows:

That it is possible for any one to fall with vertigo or faint without having any organic trouble to show and very possible that
13 the trouble would not show after death in an autopsy; that such a person might never have any organic disease and yet might faint and might have vertigo and fall over in that way; that he did not use a microscope in examining the condition of the various organs of the body in performing the autopsy, but made examination in usual way which he has followed in about 2500 autopsies.

Upon re-direct examination the witness further testified in substance as follows:

That he feels pretty well justified in saying that when examining organs he can usually come to a pretty good conclusion as to whether

the person had a diseased organ or not from simply looking at them and from their appearance and feeling.

Whereupon the plaintiff further to maintain the issues on his part joined, produced T. H. COOLIDGE, who being first duly sworn testified in substance as follows:

That he is a real estate broker at present located in New York City; that he was the representative of the A. F. Fox Company, this City, in June, 1908; that the Fox Company was acting at that time as agent of the defendant, Frank A. Munsey, in charge of the Munsey Building.

Whereupon it was stipulated by and between counsel that the annexed copy shall be sufficient evidence for proving the granting of Letters of Administration to the plaintiff, Wesley Webb, upon the estate of Samuel T. Pennington, deceased, by the Carter County Court of the State of Kentucky as is therein set forth, and that the defendant, Frank A. Munsey, owned, operated, managed and controlled the said Munsey Building and the elevators thereof on the 15th day of June, 1908; and that at and before said time the United States of America was a lessee from the defendant of certain office rooms in said building:

"STATE OF KENTUCKY:

Carter County Court, June Special Term, June 26, 1908.

On motion of Wesley Webb it is ordered that administration upon the estate of Samuel T. Pennington, deceased, the widow waiving her right to the appointment in writing, be and the same is hereby granted unto him, whereupon he took the oath prescribed by law and together with John M. Webb, his surety, who was accepted and approved by the Court, entered into and acknowledged unto the Commonwealth of Kentucky in the Penal sum of $2000.00 as administrator aforesaid conditioned according to law, and thereupon the Court grants letters of administration herein to Wesley Webb in due form.

A copy. Attest:

[Carter County Court Seal.]

JAMES FULTS,
Clerk Carter County Court.

14 The witness Coolidge further testified that the Fox Company had entire management as agents of the defendant, of the Munsey Building from April 1908, to April 1909; that the employees were under the Fox Company's supervision and that it hired and discharged them and that the Fox Company instructed them as to their duties; that it was authorized to perform these various acts by Frank A. Munsey; that witness was engaged as a manager of this building for the Fox Company and had his office in the building and instructed the employees; that he knew Clarence R. Peake;

that Peake was elevator operator in Munsey Building; that he gave instructions to Peake and the other elevator boys prior to June 15, 1908, as to running of elevator; that he gave them instructions as to operating cars, as to their appearance when operating cars, as to the number of passengers they should and should not crowd on cars; that one hand was to be on the lever at all times and the other hand to be thrown across the door of the car; that the one thrown across the door of the car was to rest upon the iron work of the car; that he was continually after the boys about this rule; that the United States of America was a tenant of Frank A. Munsey in the Munsey Building in the month of June 1908, on the fourth, seventh and eighth floors. Counsel for the plaintiff out of the hearing of the jury offered to prove that the elevator upon which Pennington was killed had accidentally dropped and failed to respond to the lever several times within two or three weeks of the accident, and that these accidents to the elevator were communicated to him by the elevator boy in charge of the elevator.

Thereupon out of the presence of the jury the following offer was made:

By Mr. PETER:

I offer to prove by Joseph F. Ryan that he was an elevator boy employed in operating the elevator upon which Pennington was killed, between the 1st day of April, 1908, and up until a week or ten days prior to the accident; that the elevator refused on a number of occasions between those dates and within two or three weeks of the accident to respond to the lever, and without apparent cause, jerked and fell, that his brother Cornelius Ryan was superintendant of said building at that time, and that he acted for the defendant and that he, Joseph Ryan, communicated these facts to his brother and requested that he be relieved from duty upon the said elevator, and in accordance therewith his brother did, a week or ten days prior to the accident, take him off of the elevator.

I offer to prove by Cornelius Ryan that he was the superintendant under Mr. Coolidge, of said building, and an employee of the defendant; that his brother Joseph Ryan did communicate the facts stated to him, that to his personal knowledge he knew that the elevator did not respond to the lever, and did, without any reason, fall and jerk, and that he did take his brother from off the elevator for the reasons stated in reference to his brother's testimony.

May it please your Honor, I have an understanding with
15 Mr. Douglas that if I think of anything else along that line I can put it in.

Mr. DOUGLAS: It is stipulated between counsel for the plaintiff and counsel for the defendant that the tender made by counsel for the plaintiff shall be as effectual as if the witness had been put upon the stand, duly sworn and the testimony then properly offered.

Mr. PETER: To all of such offer the defendant objects——

The COURT: The Court sustains the objection to the tender of proof, because it does not appear from the proof in this case that

the accident in question was caused by any defect in the elevator or in its operation.

Mr. PETER: To which the plaintiff notes an exception.

Thereupon on cross-examination the witness testified in substance as follows:

That he had known Peake from the time of taking charge of the building on the first of April; that he does not know how long prior to that time Peake had been there.

Whereupon defendant, by his counsel, asked the witness "What sort of an elevator operator was Peake?" to which question counsel for plaintiff then and there objected, and the objection was sustained by the Justice and an exception taken by the defendant, which said exception was duly noted by the Justice in his minutes.

Whereupon it was stipulated by and between counsel that according to the table of mortality a man of the age of 31 years has an expectation of further life of 34.63 years, and at 32 years of age had an expectation of 33.92 years.

It was further stipulated that the following regulations of the District of Columbia were in force on the 15th day of June, 1908, in reference to elevators:

"The following qualifications necessary for persons who are now and shall be hereafter placed in charge of running any elevator in the District of Columbia are hereby prescribed and no person shall be employed for such purpose or engaged therein unless he possesses such qualifications:

"First. He shall have a knowledge of the different parts of the machinery attached to or necessary in running such elevators, and understand the application thereof."

Whereupon the witness COOLIDGE, recalled for further examination, testified in substance as follows:

That on the elevator on which Pennington was riding at the time of his death there was an emergency switch.

Thereupon on re-cross examination witness testified in substance as follows:

That the switch was located by the controller box; by the operator's hand; that it was within a few inches of the controller box and was right underneath it and was part of the equipment of the lever; that in order to move the button the operator would have to take his hand off this and reach down and take hold of that button.

16 Thereupon the plaintiff, further to maintain the issues on his part joined, produced WILLIAM L. R. HANBURY, who testified in substance as follows:

That he is Chief Inspector of Elevators for Baltimore City and had occupied that position since November, 1906; that prior to that time he was constructor of elevators for the Otis Elevator Company, with the duty of erecting elevators and putting them and their appliances in perfect working condition; that the elevator in question is an Otis Elevator; that as chief-elevator-inspector of the City of Baltimore, his duties are to see that all safety appliances are on

elevators and that the laws are complied with in every respect and that they are all in perfect working condition, and has under his personal inspection 1600 first class passenger elevators; that there is an emergency switch on Otis Elevator Machines, usually right beside the controller, just as near the controller as it can be gotten; that he examined the elevator in the Munsey Building within a day or two prior to testifying; that there was an emergency switch on this elevator; that this switch is sometimes called a safety switch; that it is about four or five inches below the controller on the panel work of the car, inside, next to the controller; that it is put there in case of emergency to stop the elevator very quickly and suddenly; that the quickest way to stop an Otis Elevator would be to pull that emergency switch; does not think operator of elevator would have to change position any to put the emergency switch on; that in the elevator in the Munsey Building he would have to simply reach down six inches further to pull the switch; that an emergency switch is called a single knife switch; that it is not at all difficult to operate, all you have to do is to pull it out; could be pulled out very easily with a finger; that effect of operating the emergency switch is to open the circuit and thereby open the potential switch and thereby cause the elevator to come to a dead stop; that a flare in an angle piece that is set on the inside of the hatchway next to the sill or landing, whereby an elevator makes a landing, there is one on the elevator outside the court-room; that he measured the distance between the extremity of the elevator car and the grill work between the 4th and 5th floors of the Munsey Building, and at the farthest point it is six inches approximately, with a possible variation of one-fourth of an inch; that the space between the car and the floor after you get to the floor is about one and a half inches; the floor of the building projects into the elevator shaft about three and a half inches possibly a little over; the object of a flare in elevator construction is in case there is an object, a foot for instance standing on the edge of the platform, the object is to slide the foot off to keep from injuring it; the flare does this by making an incline there which pushes it gradually away; that if there is no flare, you come to a sudden obstruction; that you can safely operate an elevator within an inch or an inch and a half of the grill work surrounding the car; to safely operate the north car of the elevator in the Munsey Building the grill work should have been nearly flush with the concrete floor and then the concrete floor would hardly have projected any into the shaft,

17 possibly a quarter of an inch; that in going from half to full speed there would be very slight effect on the motion of the elevator if it were in proper working order; that the lever controlling the elevator could be carried from ascending to descending without stopping at center or neutral point; that assuming car had one passenger you could stop the car by using the emergency switch immediately, that by pulling the safety switch you stop the machinery of the motor which necessarily stops the car, and that the only motion then attached to the car would be what was left in the sag of the cable, which would allow about an inch each way

up and down on the elevator in the Munsey Building; the fifth floor projects into the shaft at right angles with the grill work;

"By Mr. PETER: Assuming that he was exercising ordinary prudence and diligence, and was a reasonably active young man, what length of time would be consumed in his taking his hand from the lever and using the emergency switch?

A. That simply means if a man had hold of the controller in this manner (indicating) he simply needs to do (indicating with motion of his hand)——

Q. And that would be a fraction of a second? A. Just so? (Indicating with a movement of his hand.)

Whereupon upon cross-examination, the witness testified in substance as follows:

That he has always known the emergency switch to be called an emergency switch or safety switch; that you could call it a cut-off or a cut-out if you wish to; that it is not a circuit breaker, although it breaks the circuit.

Q. Do you care to explain it any further? A. The switch that you have reference to simply disconnects the current or breaks the line so that the circuit breaker works. It is not the circuit breaker It operates by severing the current from the circuit breaker and causes the circuit breaker to open.

Q. It breaks the circuit but it is not a circuit breaker? A. That is the idea, yes sir.

That the elevator boy standing in the car in question would have his right hand on the lever; that the lever is three feet four inches from the floor; that the open door would be on his left; that the switch is about eight or ten inches below the controller; that there would be about sixteen inches from the operator's hand at neutral and about ten inches when turned to the right to the emergency switch; that in order to operate the emergency switch, operator would have to release his hand from the lever then take hold of the switch, no change whatever necessary in operator's body; that the effect of releasing the hand from the lever is the lever comes back to a neutral position; that the moment it comes back to a neutral position it breaks the current; that the emergency switch breaks the current but it breaks it in a different manner; that in breaking the current it shuts off the power; that if you normally cut the current off an elevator, the breaking appliances are given time to
18 work which normally would stop an elevator in about twelve or fourteen inches; that if the emergency switch were used an entirely different phase of construction is brought into play and it is so designated that when the circuit breaker falls out, which it does, it short circuits the armature and chokes the current and that holds the elevator dead, holds it in a gripping manner; that before it gets in position where it holds the elevator in a gripping manner and holds it dead, operator must have time to apply it; that if you release the lever it instantly goes to neutral position and cuts off the current instantly, but it does not do it in the manner that the emergency switch does and the elevator does not act instantly from the operat-or, so that the release of the lever will

stop it ordinarily in about twelve or fourteen inches; that if an elevator stops in four or five inches, it is unusually quick, it is out of the ordinary.

"Mr. DOUGLAS: Considering what the man has to do, to see and take in what he sees the man in the act of falling, and then turn and put on this emergency switch, would it be an extraordinary thing if you could stop a car at full speed having to do these things in a space of a few inches?

A. That is pretty good activity."

* * * * * * *

That is too quick for ordinary travel; the emergency is supposed to act instantly; they are built for that purpose and the cars can be and are stopped in less than five inches.

* * * * * * *

Q. You are doing very well if you stop it in five inches are you not? A. I won't say that even. I could not say you are performing it well.

Q. Why don't you say it? A. If the elevator is in proper working order and the potential switch or circuitbreaker is wired up properly and the emergency switch on the car is connected in properly, if he severs this connection the tensile switch will fall out, as I told you and short circuit the armature. By short circuiting the armature, the drum is brought to a standstill and the only movement left is the play between the worm-gear and the gear on the drum shaft and the vibration in the cables and there is nothing left to it, and a practical demonstration would prove it to you.

That is he had to change his position it would take a little longer to put on the emergency switch.

Upon re-direct examination the witness testified that he didn't see why operator should change his position whatever.

Whereupon in order to further maintain the issues on his part joined, the plaintiff produced LEWIS K. BROWN, who testified in substance as follows:

That he is chief of the paymaster's Division for the Auditor of the Navy Department, which is a part of the Treasury Department; that they had offices on the fifth, sixth and seventh floors of the Munsey Building in June 1908; that he knew Samuel T. Pennington very well; that Pennington was clerk in a division over which witness had charge, and had been there for fourteen months or more, and was getting $900 a year salary; that he was an excellent clerk and was so good that we recommended him for promotion to $1,000 on July 1st; that his habits were exceptionally good;

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Whereupon in order further to maintain the issues on his part joined, the plaintiff produced ARTHUR L. HICKS who testified in substance as follows:

That he is a lawyer and an examiner in the Department of Justice, that he knew Samuel T. Pennington intimately, saw him every few

lays, they frequently studied law together and had known him for twelve or fifteen years; that his habits were unusually good, so far as he knew; that he was temperate and industrious; that he was a student at the National University Law School and had taken a degree a few days prior to his death; that the condition of Pennington's health was very good; that he was a teetotaler and did not drink anything; that he never know him to have vertigo; that he never knew of any indication of fainting or vertigo; that he was married.

Whereupon on cross-examination witness testified in substance as follows:

That Pennington had a little headache once in a while; that that was the only thing he ever heard him complain of; so far as he knew, Pennington had never been treated by a physician and is pretty sure he had not.

Whereupon the plaintiff further to maintain the issues on his part joined, produced ELLA W. PENNINGTON, who testified in substance as follows:

That she is at present living in Ashland, Ky., that she was living in Washington in June, 1908, and had been living there for ten months and twenty-two days; that she had known Pennington for eight years prior to the time of the accident; that he had lived near her in Kentucky; that at that time he was teaching public school; that from Kentucky he went to Norfolk, Va., to work for the Government; that from Norfolk he came to Washington; that he had been living in Washington two and a half years prior to the accident; that she and Pennington were married on the 24th day of July, 1907; that her husband was 31 years of age on June 4, 1908, that the accident happened on the 15th day of June, 1908; that her husband was getting $900 a year salary; they kept house; that his health was very good, that she had never known him to have vertigo, faint or fall down, or have a doctor; that he never used alchohol; that he was an exceptionally good husband; that on the 15th of June, 1908, he left his home at quarter past eight o'clock; that he said that he felt good when he left the house on that morning; that Pennington's father and mother were not living at the time of the accident; that he had seven brothers and sisters; that at the time of his death four of them were minors; that after their mar-
20 riage she had no knowledge of any financial assistance her husband rendered his brothers and sisters; that she knew that he sent money for the children to go home each year; that he was going to send money for them to go home the next week; that he was an exceptionally kind husband and generous to her. That he supported her after her marriage and was her sole support. That he worked at the time of the accident on the seventh floor of the Munsey Building.

Whereupon plaintiff further to maintain the issues on his part joined, produced ERNEST C. REUBSAM, who testified in substance as follows:

That he is a Civil Engineer in the employ of the Supervising Architect's Office for the Treasury Department; that he has had experience for the past nine years in the designing of buildings for installation of elevators, about one each month; that a flare or fender as used in elevator shafts is an inclined piece of sheet metal that extends from the grill of one story to the level of the floor construction at the floor above, and it is inclined so as to prevent people from getting their feet or heads caught against the under side of the floor construction; that it does so by presenting an inclined surface rather than a square corner and therefore has a tendency to shove any object back that would come in contact with it; that the height and breadth of these fenders vary according to height of the story, the design of the building and vary from 18 inches to 3 feet; that there is no fixed distance.

Whereupon upon cross-examination the witness testified in substance as follows:

That the fenders do not go from one floor to the other but go from the top of the grill to the floor above;

Whereupon the plaintiff further to maintain the issues on his part joined, recalled CLARENCE PEAKE for further examination, who testified in substance as follows:

That when Pennington fell he fell toward the forward part of the elevator—toward the opening in the elevator; that the elevator was closed on three and a half sides; that it was half open on the west side; *that it was half open on the west side;* that it was upon that side that they had the collapsible door; that when he fell he does not know exactly how he was caught; that as near as he can remember his head was out of the elevator car; that the rest of his body was in the car; that his head came in contact with the under part of the projection of the fifth floor; that he was dead when he was taken out of the elevator; that the accident happened about nine o'clock in the morning.

Whereupon on cross-examination the witness testified in substance as follows:

That he did not see Pennington's head when it actually struck the wall; that he could not tell whether it hit the wall or came in contact with the floor; when he fell witness was in such excitement trying to stop the car, to try to keep him from being caught
21 in there; that he knows that he fell forward and hit something; that he might have hit the wall before he was caught.

Whereupon on re-direct examination the witness testified in substance as follows:

That he cannot tell positively what stopped the car when it stopped; that he released the lever but does not know whether that stopped the car, or whether his body caught or not.

By Mr. PETER:

Q. How far from the landing of the fifth floor did the elevator stop? A. I said before when I released the lever it slid four or five inches, the space of the fifth floor, the flooring proper; I judge about a foot and a half. It must have stopped about two feet or so below the fifth floor.

Q. And at that time what was in between the floor of the elevator and the bottom of the fifth floor of the building?

A. That was where Mr. Pennington was caught.

Q. What part of Mr. Pennington was there? A. I cannot say positively, I don't know how he was caught.

Q. To the best of your recollection, what part of Mr. Pennington was between the floor of the car and the bottom of the fifth floor at that time? A. Part of his head, and I think one of his arms.

Whereupon upon re-cross examination the witness testified in substance as follows:

By Mr. DOUGLAS:

Q. And did you, as soon as you saw him in the act of falling, instantly release the lever? A. Yes sir, instantly.

Q. Did it work perfectly? A. Perfectly; it jumped back to neutral and stopped at the usual time that it always did.

Whereupon plaintiff, further to maintain the issues on his part joined, produced JOSEPH G. RYAN, who testified in substance as follows:

That he is an elevator operator; that he was employed in the Munsey Building in June 1908; that he had worked on the north elevator close on to three months and had ceased to work on it about three days before the accident; that his brother was superintendent of the building; that the paint on the cage of the elevator near the door was kinder rubbed off from putting your hands on it, when you put your hand there over across the door.

Whereupon the defendant to maintain the issues on his part joined, produced ERNEST L. WHITE, who testified in substance as follows:

That he lives in Washington; that he is Chief Engineer of the Munsey Building; that he has held that position for three years; that he has charge of the elevators of the building and is familiar with them; that they are Otis elevators;

Q. Have you had occasion to study elevator construction
22 and everything of that sort? A. Only as would naturally come in my line of business in order to be able to make repairs and see that they were in proper order.

That he is familiar with the different makes and kinds of elevators; that he has had occasion to study their efficiency and safety; that he has been an engineer for 27 years; that the north elevator in the Munsey Building had what is known as a safety or emergency switch.

Q. Mr. White, did this north elevator have on it what is known as a safety switch or emergency switch? A. It did.

Q. Is that switch known as a safety switch? A. It is not.

That this switch is ordinarily called by elevator constructors a potential switch, but that common practice among workmen is simply to call it a circuit breaker; that its function is to immediately break the electric circuit or the wires and throw out an automatic circuit breaker down below on the switch-board in the basement, that the effect when you shut off the circuit is to disable the car—it cannot be moved in one way or the other; that the principal purpose of this emergency switch is so that if the operator leaves his car, if he is obliged to leave it on a certain floor, by pulling that switch, no matter if some one opens the door on the elevator no one can move that car; it is helpless; it cannot be moved until the switch is put back in place and the man goes down into the basement and throws that other circuit breaker in; that if one wants to stop a car very suddenly or as quickly as possible, the quickest way is by releasing the lever and letting it go back to neutral position; that it is quicker than taking out this switch because the lever is right in your hand, just simply let it go and it will stop instantly, as quick as any device could stop it; with this circuit breaker switch you have to release the lever first, and then stoop down to operate this little knife switch; that you cannot operate with your left hand, it would be almost physically impossible to do it in that position; before you could possibly reach that switch your car has already stopped from the release of the lever; that a car will stop quicker going up than going down; that going down it has its own weight and whoever is in the elevator and has a tendency to go a little further. Going up it is safe to say it can be stopped in six inches, but going down if the operator stops it in four or five inches it is all that could be done; it is quicker than could be done by the use of the circuit breaker or safety switch; that in order to operate the safety switch you would have to stoop down to the controller box; that he has handled these cars a great many times himself; that the natural position of the hand is just the length of the arm on the lever when the car is at rest; that to reach the emergency switch you have to stoop and reach sixteen inches lower than this handle; it is dark under there; that is, the car is painted black and its being right under the controller box it makes it dark, so if you wanted to stop instead of reaching down there you would simply release the handle because that would be the quickest; that the emergency switch is not a snap switch but a regular knife switch, it is a little lever, that you have to force it in place and pull it out.

23 Whereupon upon cross-examination the witness testified in substance as follows:

That the lever at neutral point is about thirty-six inches from floor, he measured it about 2 years ago; that you pull the knife switch down to break the circuit and stop the car and if you push it up that connects it again; it is certainly not hard to do; the emergency switch is on the side next to where the hand would be when the car was ascending at full speed, the lever pulls over in ascending about

four or five inches and then the hand is about a foot from the emergency switch; that a man cannot reach down a foot from the controller to the knife switch without stooping; that he has tried a dozen times; that ordinarily the effect of carrying the lever over to reverse would have been to have brought the car to a standstill and then to have gone down with the down motion; that it is not necessary to stop the lever at neutral before you carry it over at once to descending; the hand could have carried that lever from full speed ascending to full speed descending without the hand stopping at all; this is the same thing as reversing and will take a second; that the lever would go more quickly to neutral if it is released than if carried with the hand, or helped by the hand.

Q. That its principal purpose was to keep the elevator from moving when nobody was on it. What are the other purposes? A. I was used for that purpose. That is, if the elevator operator has to leave the car to make repairs and did not want a person to move the car, by pulling that switch out he would make it impossible for them to do so, it would be impossible to move the car; and if you had gotten on a car and were running it and had reason to believe that somebody had tampered with the controller and found it did not operate, you could stop the car by that switch. So, it is a safety device, plain and simple, but not an emergency device.

Q. Then you mean the device that is used simply to keep the car standing when nobody is on it is a safety device? A. Yes, a safety device.

Q. Are those the only purposes for which it is used? A. Those I have named are the only ones I have known them to be used for.

Q. It is not one of its purposes to suddenly stop the car? A. No.

Q. Will it stop the car? A. It will, but no more suddenly than the controller.

Q. Is there any difference in the method by which the car is cut off when the lever is allowed to go to neutral and when it is cut off through this safety switch? A. Yes.

Q. Will you tell us what is the difference in the method. A. In cutting off the current with the safety switch you break the current at the board entirely. There is no current in any wires leading to the car, the car is dead, as though it was not connected. When the car comes to the neutral position—that is, when the lever is thrown in the neutral position, it simply acts on the controller of the board; it works the magnets of the board, that high speed and the low speed and the up and down motion magnets; whereas, this switch cuts off the current entirely and throws the breaker out. The hand controller does not throw the breaker out.

24 Q. When you use the lever, as I denominate it, is it not true that some electricity remains unused, from the dynamo up through on up to the wires of the elevator? A. Yes, to the points of the contact that the hand controller touches to those points, there is current.

Q. Does either device short circuit? A. No.

Q. Are you positive that the use of the emergency switch does not short circuit? A. It does not.

Q. Are there not two contact points on the potential switch, one at the top and one at the bottom? A. No sir, one at the top, none at the bottom.

Q. Is there any specific name for the type of elevator that the Otis Elevator Company has installed there on the north elevator? A. I don't know that it is distinguished by any particular name. I presume they have a name, but I could not say whether they have or not.

Q. How many recent, up-to-date Otis elevators have you had? been under your charge and inspection? A. I have had none any more than the ones that I have in the Munsey Building. That if the potential switch were pulled then the car would be stopped in about eight inches going up; that the distance might vary in some elevators; that the shortest distance in which the potential switch would stop an elevator would be not under six inches going up.

Q. Are you certain that the Otis Elevator Company has no emergency switch on the cars themselves for the purpose of stopping in an emergency? A. I only know as to the cars that I have.

Q. Then, I understand from you that you do not know whether there may not be on the Otis Elevators such a thing as an emergency switch? A. I could not say on other elevators

Q. I say, you don't know. A. I would not say there was not—only on elevators I have charge of.

Q. Will you look at this (Exhibiting book to witness)? A. It is sometimes provided. Very possibly, it is.

Q. To do what? A. To stop the elevator in emergencies.

Q. Now, that is the letter S, is it not? A. Yes.

Q. Is not this denoted letter S? A. I think very likely.

Q. Now, tell me what difference there is between that letter S, provided to stop the car in emergencies, and the potential that you found on this car. A. According to this diagram there appears to be no difference. It is marked "safety."

Whereupon on re-direct examination the witness testified in substance as follows:

That he does not know of any better device for stopping a car than there was on this car.

Whereupon the defendant, to further maintain the issues on his part joined, produced WILLIAM I. EVANS, who being first duly sworn testified in substance as follows:

That he is Inspector of Elevators for the District of Columbia; that he has occupied that position since 1902; that it is his duty to examine all passenger elevators every three months; that in that connection he has had occasion to examine the elevators in the
25 Munsey Building in 1908; that he made an examination of the elevators in the Munsey Building on the day of the accident to Pennington an hour after the accident and also not longer than three months before; on the day of the accident he made a thorough examination, testing out all the safety devices and everything pertaining to the machinery, including ropes and entire apparatus; that he made a particular examination of the elevator in which

the accident occurred; that when he found the elevator it had been brought down to the basement rather to the first floor but not placed in commission, had not been used again after accident for passengers until after his inspection; that the elevator was in normal condition; he tested all safety devices; that he started the car from the top of the house down motion full speed; tested the safety devices which worked properly; tested the emergency switch inside of the car; it worked properly; and tested the slack cable device on the machine. Everything being normal he then allowed the elevator to continue to work; that he tested the lever; that it was working good; that by the safety device he meant a mechanical device underneath the car platform which the governor controls and prevents the rope from breaking, and if anything unusual occurs, the car goes into safety by its own volition; that it works automatically; he then tested the emergency switch which is inside of the car, and that in turn, throws out the potential switch on the controller board; that this worked perfectly; that the potential switch is located on the controller board and it is supposed to work the brake and all connections with the machine in the event of any trouble or anything unusual occurring; that it is put there so that if the slack cable take-up should open, that, in turn, is connected with the potential switch and that opens the potential switch, if a slack cable should occur on the drum; it does the same thing if the boy should pull the emergency switch on the inside of the car; that it opens the potential switch; that the emergency switch is located in the car for the use of the operator in the event he should lose control of the car or the controller or handle that he works up and down; in the event he loses control of the car with that handle, he is supposed to pull the emergency switch, which stops the car; that after the emergency switch is pulled, it is necessary for one to go to the controller board and return the potential switch to its proper position; that the minute the emergency switch is opened the potential switch down stairs opens and the car is dead; that the car can be reasonably stopped by the controller in from five to eight inches going up.

Q. How quickly could it be stopped by the controller? A. That is left entirely to the adjustment. A machine can be adjusted to such a point that it would be stopped immediately when the controller is released. Of course, in that case, that does a great deal of harm to the machine; and it is left entirely to the judgment of the engineer.

Q. Having relation to what would be a proper adjustment, with a view to machinery and the proper preservation of the machinery within what space—— A. Five to eight inches on the up
26 motion. The car could not be stopped any quicker by the use of the emergency switch rather than the controller; that there is no quicker way to stop the car than releasing the controller switch on the car.

Whereupon upon cross-examination the witness testified in substance as follows:

Q. This device on the side of the controller is known as an emergency switch; is it? A. Yes, sir.

Q. Is it put there for emergencies? A. It is.

Q. That is right? A. Yes, sir.

Q. And one of the emergencies for which it is put there is, if for any reason it is desirable to stop the car instantly, to prevent accident, they can use that switch; is it not? A. The quickest way, as I said before——

Q. Just answer me, whether that is one of the purposes, and then, if you have any explanation, I will not object to it. Will you kindly read the question to the witness?

(The question referred to was read by the stenographer.)

A. Yes.

Q. Can you do it? A. Not unless there is some abnormal condition.

Q. Under normal conditions, the pulling of the switch does not short-circuit the armature? A. There is a short circuit present when the machine comes to rest. I wish to make another statement there. When the circuit brake is opened, or the potential switch is opened, there is a short circuit across the lines in the elevator; yes.

Q. Is that the effect of pulling that potential switch such that there is a grab made upon the motor; and it is stopped practically instantly? A. Oh, no.

Q. Nothing grabs the motor? A. No. Your armature is short-circuited, and you are then running into a counter E. M. F. into your armature. The motor then makes itself a generator, and that generates a counter E. M. F. in the armature, which brings the machine to a stop, and the brake holds it after the machine is stopped.

Q. What happens when you use the potential? A. That happens when you use the emergency.

Q. You are right; the emergency. The emergency is right next to the lever. It operates on the potential, which is down stairs? A. Exactly.

Q. When the lever is carried to neutral, does it short-circuit the armature? A. Yes.

Q. It does? A. Yes. You get the same effect when you stop the car with the emergency switch as you do when you stop it with the potential switch.

Q. Every time this car was stopped by the lever going to neutral, a short circuit in the armature was created? A. Yes.

Q. Are you positive of that? A. I am; yes, sir.

* * * * * * *

27 Then when he tested the lever after the accident he let it go from full ascending to neutral; that it went of its own accord, but can't recall the distance it stopped the car in; it may have been five inches or eight inches; that the circuit braker was open when he arrived there; that the car was dead; that this car can be

adjusted to stop in case of an emergency instantly, in two inches, but with detriment to the machine; the distance between the grill work surrounding the car and the platform of the car between the fourth and fifth floors before you came to the concrete floor was five and three-quarter- inches; the concrete floor was about 28 to 36 inches in width and same to about 1¼ inches from the platforrm of the car.

Q. Was the elevator or not in the same condition at the time that you examined it, immediately after the accident, that it was on occasion when you examined it three months before the accident? A. That I cannot answer from memory.

Q. Is it not true that you complained to Mr. Ernest Coolidge about the condition of those elevators between the first of 1908, and the time of the accident?

Mr. DOUGLAS: One moment. I object to that as irrelevant. It is wholly immaterial, and it is not responsive to the direct examination.

Q. So far as you know, was there any difference in the condition of the elevator on the day you examined it and its condition during the period of three months? A. I can't recall that from memory.

Q. Is it not true that you complained to Mr. Ernest Coolidge about the conditions of these elevators between the first of April, 1908, and the time of the accident?

Mr. DOUGLAS: I object on another ground, that the question does not confine itself to the elevator in question.

Mr. PETER: Limit it to the elevator in question.

A. My records would show any complaint that I had to make to Mr. Coolidge, on each examination. It is frequently my duty to call attention of agents, owners and managers to the condition of their machines. If, for any reason, Mr. Coolidge——

By Mr. PETER:

Q. I am not asking you that. I want to know whether you recollect having made complaint to him. A. I do not recall that at this time.

Q. Are you positive you did not. A. No, I am not positive that I did not.

Q. Have you not known of levers to work along all right a dozen or more times and then, without any rhyme or reason, to work improperly? A. Yes; I have examined levers in elevators and in three months gone back and found the machine out of condition. I have found levers out of condition which were in good condition three months prior to that time.

28 Whereupon upon re-direct examination the witness testified in substance as follows:

The brake is adjusted by means of a spring. It is left entirely to the judgment of the person operating the car—I mean to say the engineer in charge, as to how that brake should operate. The adjustments of the brake are made by means of a spring. On the

machine, downstairs in the motor room. The operator has absolutely nothing to do with it. It is done before the car goes into commission. That he thinks a car is in good working condition when it can be stopped in from five to eight inches on the up motion; that it would be wrong to adjust a car so that it would stop short of five inches.

Whereupon, upon re-cross-examination, the witness testified in substance as follows:

That to adjust the car so that it would stop short of five inches would wreck a car, by continually using it; he means that the machine would wear out sooner than if it were adjusted for a less stop.

Whereupon upon examination by the Court the witness testified in substance as follows:

That this elevator was worked by electricity; that that was its motive power; that in order to have electricity to give any power at all there must be a circuit; that the emergency brake was used to break the circuit; that throwing the lever to neutral also breaks the circuit; that the car would have stopped just as quickly by breaking the circuit as it would if you had chopped off either end of the wires; that the car would have stopped just as quickly if you had used either or both of these means, that the method of stopping the car would be the same no matter what devices were used provided you broke the current; that the power applied to the car, having been destroyed because the circuit is broken, the brakes stop the car and hold the machine; that the car will stop as quickly without a short-circuit as it will with one.

Whereupon the witness ERNEST L. WHITE was recalled for further examination and testified in substance as follows:

That he took charge of the car from the time of the accident to the time Mr. Evans came there; that he got on the car and went down from the fifth floor to the first floor; that there was no change in the condition of the car from the time the accident happened until the time Mr. Evans got there.

Whereupon the defendant produced LOUIS A. FOSTER, who being duly sworn testified in substance as follows:

That he is Assistant Manager of the Otis Elevator Company and has had experience with and studied elevator construction and is familiar with the Otis Elevators generally and knows the Otis Elevators in the Munsey Building; that he has studied the construction and operation of elevators for fourteen years and before he became Manager here was with the Westinghouse Company in Pittsburgh;

29 the purpose of the safety switch in the car is mainly to stop the car in the event of the failing of the operating devices; if the operator should try the switch in the car and it fails to stop he is supposed to reach down and stop it by means of the safety switch; he is to operate primarily the lever by returning it to the center; by releasing it; that the quickest way to stop an elevator in the case of emergency is to release the handle; stopping an ele-

vator in that way compares alike in rapidity with the other way; the operator would lose time in reaching for the switch; the time within which a car can properly be stopped in an emergency varies according to the speed of the elevator in different buildings; if it is running at full speed it is feasible and practicable to stop it in about ten to twelve inches; it might be unusual for the car to be stopped in five, six or seven inches for the reason that it is bad for the machinery; that would be greatly determined by the speed of the car; the elevators in the Munsey Building would probably under ordinary conditions stop in ten or twelve inches; if the car stopped in five or six inches it would be stopping shorter than usual.

Thereupon upon cross examination, witness testified as follows:

By Mr. PETER:

Q. Mr. Foster, does the safety switch short circuit; does the use of it short circuit? A. When you throw the safety switch; when you open it?

Q. Yes. A. Well, it opens the potential switch and cuts the current off from the machine.

Q. When the potential switch is opened by pulling the safety switch, does that short circuit the armature? A. That is a point that I am not familiar enough with to answer in detail about.

Q. You do not understand the operation of the safety switch? A. Yes; in the manner that it opens this potential switch and cuts the current off from the machine.

Q. Does it short circuit the armature, or not? A. I don't understand the details of that.

Q. Why not? A. Because that is an end of the business that I do not follow closely enough.

Q. When you carry the lever over from ascending to neutral, does it short circuit? A. From ascending to neutral?

Q. Yes. A. The safety switch?

Q. No, the lever; when you carry the lever from ascending to neutral does it shore circuit the armature? A. That is another detail I cannot answer.

Q. With what degree of rapidity does a short circuit operate, in stopping a car? A. I do not believe I quite clearly understand that question.

Q. Does not a short circuit stop a car with great rapidity? A. No; I cann-t say that it would.

Q. Are you positive? A. No, I am not.

Q. Do you not know that the quickest way to stop a car is by a short circuit, and that when the potential switch is put into use by means of the safety switch it creates a short circuit of the armature? A. No; those are details I am not familiar with.

30 Q. Will you say it does not? A. I am not familiar with the details.

Q. Will you say it does not? A. I am not familiar enough with it to say yes or no.

Q. You don't know whether a short circuit is the quickest way to stop an elevator or not?

Mr. DOUGLAS: I object to that. The question has been asked over and over again.

The COURT: He says that he does not know anything about it and that he has never taken any course of study in electricity, so why should we consume any time over that?

By Mr. PETER:

Q. Does the use of the safety switch break the main circuit? A. Yes sir.

Q. Does it release the safety brake? A. The brake on the machine?

Q. Is there a safety brake? A. Well, that might be applied to the brake on the machine, which is sometimes called a safety brake.

Q. Does the pulling of that safety switch release the safety brake? A. The opening of the safety brake?

Q. Yes. A. Release the safety brake?

Q. Yes. A. It releases the brake on the machine, if that is the brake you mean.

Q. You say that is sometimes called a safety brake? A. Yes sir.

Q. Has the position of the resistance arm, at the time of the use of the safety switch, anything to do with short circuiting?

The COURT: Answer the question, and if you don't know say so. This witness says that he knows nothing about this question. If you can answer that question, answer it; if you cannot, say so.

The WITNESS: No.

The COURT: Do you mean that you don't know?

The WITNESS: Yes sir.

By Mr. PETER:

Q. Do you know whether a short circuit would act as a brake on the motor?

Mr. DOUGLAS: That is the same question if your Honor please.

The COURT: Do you know?

The WITNESS: No, the details are not familiar to me.

By the COURT:

Q. I understand you to say that you have no familiarity with electricity at all. Did I understand you correctly? A. Not on that particular point.

By Mr. PETER:

Q. You are acquainted with this elevator in the Munsey Building? A. Yes sir.

* * * * * * *

31 By Mr. PETER:

Q. I will ask you first as to whether there is such a thing as a contact point on an elevator? A. On the controller.

Q. Is there such a thing as a contact point on the potential switch? A. Yes; it could be termed that.

Q. How many contact points are there on the potential switch in the elevator in the Munsey Building? A. I can't say.

Q. You know the design of the elevator that is there; don't you? A. Yes sir.

Q. That is one of the elevators you are accustomed to sell? A. Yes sir.

Q. Has it not two contact points to the top of the potential switch and one at the bottom? A. That I can't answer. I am not familiar enough with it.

Whereupon at the conclusion of the evidence the defendant requested the court to instruct the jury as follows:

The jury are instructed that under the evidence and pleadings in this case they are to return a verdict for the defendant. Which instruction the court refused to give as prayed for by the defendant, and to the refusal defendant then and there prayed an exception, which exception was allowed and duly noted by the Justice in his minutes.

All the exceptions herein stated having been duly taken, allowed, settled and noted during the trial before the jury rendered its verdict, the defendant presents to the court, this his bill of exceptions and prays the court to sign and seal the same, and make the same a part of the record, to have the same effect as if each of the said exceptions *were* contained in a separate bill and had been signed and sealed during the trial; and the same is accordingly done, now for then, this the 31st day of October, 1910.

HARRY M. CLABAUGH,
Chief Justice of the Supreme Court of the District of Columbia.

Settled by consent:
ARTHUR PETER,
Attorney for Plaintiff.
DOUGLAS & BAKER,
Attorneys for Defendant.

Directions to Clerk for Preparation of Transcript of Record.

Filed Nov. 2, 1910.

* * * * * * *

The defendant designates the following portions of the record to be included in the transcript of record on appeal;

1. Declaration.
2. Plea of Defendant.
3. Joinder of Issue.
32 4. Memorandum of verdict.
5. Judgment and notation of appeal.
6. Memorandum of filing of appeal bond July 19, 1910.
7. Memorandum submitting bill of exceptions to court.
8. Order making bill of exceptions of record.

9. Bill of exceptions.
10. Memorandum of extension of time from day to day to December 1, 1910, for settling bill of exceptions and filing transcript of record.
11. This designation.

DOUGLAS & BAKER,
WILTON J. LAMBERT,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 59, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51169 at Law, wherein Wesley Webb, Administrator of the estate of Samuel T. Pennington, is Plaintiff and Frank A. Munsey is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of November, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2251. Frank A. Munsey, appellant, *vs.* Wesley Webb, adm'r, &c. Court of Appeals, District of Columbia. Filed Nov. 21, 1910. Henry W. Hodges, clerk.

33 TUESDAY, *February 14th, A. D.* 1911.

No. 2251.

FRANK A. MUNSEY, Appellant,
vs.
WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington.

The argument in the above entitled cause was commenced by Mr. H. H. Obear, attorney for the appellant, and was continued by Mr. Arthur Peter, attorney for the appellee, and was concluded by Mr. C. A. Douglas, attorney for the appellant.

34 In the Court of Appeals of the District of Columbia.

No. 2251.

FRANK A. MUNSEY, Appellant,
vs.
WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington, Appellee.

Opinion.

(Mr. Justice VAN ORSDEL delivered the opinion of the Court.)

This suit was brought in the Supreme Court of the District of Columbia by appellee, plaintiff below, to recover damages for the death of his intestate, Samuel T. Pennington, who was killed in an elevator accident in a building owned and controlled by appellant. For convenience, appellee will hereafter be referred to as plaintiff, and appellant as defendant.

It appears that the accident occurred in what is known as the Washington Times Building in this City. The elevator shaft is constructed of iron grill-work. The floors of the building project into the shaft on all sides a distance of three and one-half inches. The elevator car is sufficiently small to leave a space between the outside of the car and the projecting floors of two inches, leaving a space between the grill-work of the elevator shaft and the sides of the car of five and one-half inches. At the point of entrance on each floor the shaft is provided with a sliding door. The entrance to the car is provided with a collapsible sliding door.

On the morning of the accident, plaintiff's intestate entered the elevator on the first floor of the building to be carried to the eighth floor where his place of business as a government clerk was located. At the time of the accident, which occurred between the fourth and fifth floors, the collapsible sliding door of the car was not closed. Pennington was the only passenger, and was standing about the center of the car, when he suddenly reeled and fell. His head protruded through the open car door a sufficient distance to be caught between the floor of the car and the underside of the projecting fifth floor of the building, killing him almost instantly.

35 It is important at the outset to consider the duty which defendant owes to persons entering his building for legitimate purposes and using the elevators placed therein for their accommodation. The building in question is a business block devoted to public use. The elevators are an essential part of the building, and persons using them do so by the invitation of the defendant. It follows, therefore, that defendant in this instance is a carrier engaged in the transportation of passengers. While not in the strict sense an insurer, he is required to exercise the highest degree of diligence and care for the safety of persons using his elevators as agencies of transportation. It is doubtful if there is any known method of conveyance in which a higher degree of care is

required in its construction and operation than that of an elevator. In Mitchell vs. Marker, 62 Fed., 139, Mr. Justice Lurton said: "We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stage-coaches, and one who carries them vertically, by means of a passenger elevator."

The single exception assigned consists in the refusal of the Court below to direct a verdict for the defendant. The record discloses that at the time of the accident the deceased was standing about the center of the car. The car was moving at a normal rate of speed. No jerk or jar occurred in its movement to throw deceased from his place. His fall was not caused from any act of defendant or his employees, or from any defect in the elevator itself. The record, however, discloses that at the time of the accident the projecting floors were not equipped with flares or fenders on the underside, as appears to be customary, to guard against accident by deflecting into the car any object coming in contact with them; that the door of the car was not closed; that in violation of the instructions of the superintendent of the building the elevator boy did not have his arm extended across the open door, and that there was an emergency brake on the car which the elevator boy testified he did not
36 know how to operate, and in respect of the operation of which he had been given no instructions. Upon these issues of fact the jury, by its verdict, found the defendant guilty of negligence. On the other hand, it is not contended that plaintiff's intestate was guilty of contributory negligence. The sole question presented, therefore, is whether or not defendant's negligence was the proximate cause of the accident.

The proximate cause of an injury is ordinarily a question of fact for the jury. If there are no circumstances from which a jury can reasonably find that the negligence of a defendant was the proximate cause of the injury, the question is one for the court, and not for the jury. But if the facts are such as to cause reasonable minds to differ, then the question is one clearly for the determination of the jury. It was argued by counsel for defendant that the fall of the deceased was caused, not through any defect in the movement of the elevator, but by the act of God; and as this was the immediate, proximate cause of the injury, however negligent the defendant's agent may have been in leaving the door of the car open when the elevator was in motion, it can not be charged that the accident was due to the negligence of defendant.

We are not impressed with this contention. As was said in Milwaukee etc. Ry. Co. vs. Kellogg, 94 U. S., 469: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. * * * In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. * * * Such refinements are too remote for the rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent

on those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continu-
37 ous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

In general the law looks to the proximate, and not to the remote, cause of the accident. The facts must constitute a succession of events so connected as to make an entire whole, without any new intervening cause. The proximate cause may not be the immediate, antecedent cause. It is sufficient if it sets in motion a series of events which terminate in the accident. Of course, the wrong and the injury must not be separated by an independent cause. In that event, not the original wrong, but the intervening act, would be the proximate cause. The intermediate cause, however, must be self-operating and disconnected from the primary wrong. What were the causes that produced the injury in this case? It was not alone the falling of the deceased—that was merely the incident which exposed in bold relief the negligent manner in which the elevator was constructed and operated;—but the projecting floors in connection with the open door of the car when the car was in motion furnished a situation that might subject passengers to the danger of being injured in various ways and under numerous circumstances. The mere fact that a dangerous condition existed was sufficient to charge defendant with knowledge of the probability of a passenger's getting caught between the projecting floors and the floor of the ascending car.

It may be conceded that the falling of the deceased was the immediate cause of the accident, but it formed only the connecting link between the injury and the negligence of defendant. If the door of the car had not been open, a condition which existed only because of the negligence of defendant, the injury could not have been inflicted. It, therefore, follows that if, technically speaking, the negligence of defendant was not the efficient cause, it was the cause but for the existence of which the accident could not have happened. Whether or not the casual connection between
38 the negligence of defendant and the accident was sufficient to establish defendant's negligence as the proximate cause of the injury was a question of fact for the jury, which has been by the verdict resolved in favor of the plaintiff. This rule as to the proximate cause is supported by the highest authority.

In Milwaukee etc. Ry. Co. *vs.* Kellogg, supra, the injury complained of was the burning of a sawmill which was ignited by a burning elevator which had caught fire from one of the railway company's boats. In the opinion the court said: "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the

elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber."

In Choctaw, Oklahoma, etc. R. R. Co. *vs.* Holloway, 191 U. S., 334, a horse wandered on to the tracks of the railroad company, and fell into a trestle. The train struck the horse and the engine and tender were derailed, causing the accident complained of. It appeared that the engine was not furnished with brakes, and the court held that the proximate cause of the accident was the failure of the railroad company to properly equip the engine with brakes. On this point the court said: "It is insisted, however, on the part of the defendant, that the court erred in not holding that the absence of brakes on the engine was not the proximate cause of the injury; that the presence of the horse on the trestle was the proximate cause of derailing the tender and engine, and that the company was not guilty of any negligence by reason of which the horse came upon the trestle. We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the engine. At any rate, there was
39 evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine in good order and fit for use."

In Hayes *vs.* Michigan Central R. R. Co., 111 U. S., 228, 241, a boy was in a park adjoining the railroad track, and a portion of the fence between the park and the track was down. Another boy on the ladder of a car in a passing train motioned the plaintiff boy to come along. The plaintiff started to run beside the train, and as he did so, turned and fell, the car wheels passing over his arm. The trial court instructed a verdict in favor of the defendant. On appeal the court, reversing the judgment, said: "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, causa causans, this is no doubt strictly true; but this is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non, a cause which if it had not existed, the injury would not have taken place, an occasional cause, and that is a question of fact, unless the causal connection is evidently not proximate.

In McDonald *vs.* Toledo R. R. Co., 74 Fed., 104, it appeared that snow had fallen in the City of Toledo, Ohio, and drifted at the intersection of two streets to the depth of four feet. One of the streets was occupied by the tracks of the defendant company. The snow was removed from the tracks by the direction of the company and piled in an irregular mass to a depth of from four to six feet on either side of its tracks and between the tracks and the curbstones of the street. Plaintiff was driving past a car standing on the tracks of the company when the car started. His team became frightened, and ran over one of the piles of snow, upsetting the buggy and causing the injury complained of. Mr. Justice Lurton, delivering the opinion of the court and reversing the judgment of the court below, said: "What, then, was the connection between his injury and the negligence of the defendant in thus obstructing the
40 street? He avers—and this on demurrer must be taken as true—that, but for the presence of this mass of snow, he

would have been able to have controlled his horses, and prevented any injury. If this is true, then this mass of snow, which ought not to have been where it was, and was only there through the action and negligent interposition of the defendant, was a cause, which, if it had not existed, the plaintiff's buggy would not have been overturned, and he would have sustained no injury. If, therefore, the negligence of the company was not the causa causans, it was the causa sine qua non. Whether it was a cause without which the accident would not have happened is a question of fact, unless the circumstances appearing demonstrate that the causal connection was not proximate."

In the case of an elevator the safety of the passengers is dependent entirely upon its proper construction and operation. The passengers are usually compelled to stand up. They are composed of men, women and children, the aged and the infirm, and it is the duty of the proprietor to have the appliances so safely adjusted that not alone those in normal health, but the most feeble, will be secure from probable accident. It is beside the case that the accident in this instance is not one that could readily have been anticipated. It is sufficient answer that if the car door had been closed it is highly improbable that the deceased would have been injured, and had injury resulted from his fall, it could not then have been imputed to the cause that here exists. The open car door was the occasional cause, without which the accident could not have happened. We are unable to distinguish this case from the cases cited. If there had been brakes on the engine, the horse on the trestle would not in all probability have derailed the engine and tender; if the sparks from the boat had not fired the elevator, the saw-mill would not have been burned; if the snow had not been negligently left in the street, the buggy would not likely have been overturned; if there had not been a hole in the fence, the boy might not have gone upon the tracks and been injured; and if the elevator car door had
41 not been left open, the deceased would not have suffered the injuries he did. In each of these cases it was for the jury to say whether had the particular act of negligence designated not existed it would have prevented the accident.

It is urged that from anything the record discloses the deceased may have been dead before his head was caught between the floor of the building and the car. An autopsy was held, and there is testimony to the effect that the brain and heart were found to be in normal condition, and that there was no indication of apoplexy or of a condition that would cause a fatal stroke. This, therefore, was a question of fact for the jury upon which the evidence adduced was all against the theory of counsel for defendant.

The car was equipped with an emergency brake, which was not employed by the elevator boy in stopping it. He testified that he had not been instructed as to its use, and did not know how to use it. Considerable evidence was adduced as to how quickly an ascending car could be stopped by the use of this brake. It is clear that the car could have been stopped in a much shorter space by its use than by simply relying upon the use of the controller, as was done in this instance. The elevator boy testified that he saw the deceased

reel and fall from his position in the center of the car. It may well be that had he at this crucial moment applied the emergency brake, the accident would have been averted. This was a question of fact for the jury upon which different minds might honestly draw different conclusions. If the jury took this view of the case, and found that the accident was due to defendant's negligence arising from the failure of the elevator boy to use the emergency brake, it disposes of the question of proximate cause. It matters not what may have occurred up to the point when the deceased fell. If, at that moment, by the exercise of reasonable care in the use of the means at hand, defendant's agent could have averted the accident, and failed to do so, the failure became the immediate and proximate cause of the accident.

42 The judgment is affirmed with costs and it is so ordered.
Affirmed.

43 MONDAY, *May 1st, A. D.* 1911.

No. 2251, April Term, 1911.

FRANK A. MUNSEY, Appellant,
vs.
WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby, affirmed with costs.

Per MR. JUSTICE VAN ORSDEL.
May 1, 1911.

44 FRIDAY, *May 5th, A. D.* 1911.

No. 2251.

FRANK A. MUNSEY, Appellant,
vs.
WESLEY WEBB, Administrator of the Estate of Samuel T. Pennington.

On motion of Mr. H. H. Obear, of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of ten thousand dollars.

45 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Frank A. Munsey, Appellant, and Wesley Webb, Administrator of the Estate of Samuel T. Pennington, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

——— ———.

46 (*Bond on Writ of Error.*)

Know all men by these presents, That we, Frank A. Munsey, as principal, and National Surety Company of New York, N. Y., as surety, are held and firmly bound unto Wesley Webb, Administrator of the Estate of Samuel A. Pennington, deceased, in the full and just sum of Ten thousand dollars ($10,000) to be paid to the said Wesley Webb, Administrator, or his certain attorney, executors administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this nineteenth day of May, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Frank A. Munsey and Wesley Webb, Administrator of the estate of Samuel A. Pennington, deceased, a judgment was rendered against the said Frank A. Munsey and the said Frank A. Munsey having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed

to the said Wesley Webb, Administrator, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That is the said Frank A. Munsey shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK A. MUNSEY. [SEAL.]

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY,
By W. H. RONSAVILLE,
Attorney-in-Fact.

Sealed and delivered in the presence of—
C. H. POPE.
CHAS. T. CHAPMAN.
ALEX Y. JOHNSON

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2251. Frank A. Munsey, appellant, vs. Wesley Webb, Administrator of the Estate of Samuel T. Pennington. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 24, 1911. Henry W. Hodges, Clerk.

47 UNITED STATES OF AMERICA, *ss:*

To Wesley Webb, Administrator of the Estate of Samuel T. Pennington, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Frank A. Munsey is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 24th day of May, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service acknowledged May 24th, 1911.
ARTHUR PETER,
Counsel for Appellee.

[Endorsed:] Court of Appeals District of Columbia. Filed May 24, 1911. Henry W. Hodges, Clerk.

48 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Frank A. Munsey, Appellant, vs. Wesley Webb, Administrator of the estate of Samuel T. Pennington. No. 2251. April Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of May, A. D. 1911.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

49 In the Supreme Court of the United States, October Term, 1911.

No. 655.

FRANK A. MUNSEY, Plaintiff in Error,
vs.
WESLEY WEBB, Administrator of the Estate of Samuel A. Pennington, Deceased, Defendant in Error.

Assignment of Errors.

1. The Court below erred in affirming the action of the trial court, refusing to direct a verdict for the defendant.

2. The Court below erred in holding that there was sufficient evidence to show that the elevator in question could have been stopped within a shorter distance than it was on this occasion.

CHAS. A. DOUGLAS,
Counsel for Plaintiff in Error.

[Endorsed:] 655. 22,731.

50 [Endorsed:] File No. 22,731. Supreme Court U. S. October Term, 1911. Term No. 655. Frank A. Munsey, Pl'ff in Error, vs. Wesley Webb, Administrator etc. Assignment of Errors. Filed August 31, 1911.

Endorsed on cover: File No. 22,731. District of Columbia Court of Appeals. Term No. 324. Frank A. Munsey, plaintiff in error, vs. Wesley Webb, administrator of the estate of Samuel T. Pennington. Filed June 12, 1911. File No. 22,731.

16

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 40.

FRANK A. MUNSEY, PLAINTIFF IN ERROR,

vs.

WESLEY WEBB, ADMINISTRATOR OF THE ESTATE OF SAMUEL T. PENNINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES A. DOUGLAS,
JOHN W. PRICE,
HUGH H. OBEAR,
Attorneys for Plaintiff in Error.

WILTON J. LAMBERT,
C. K. MOUNT.
J. NORMENT POWELL,
H. H. SHELTON,
THOS. RUFFIN,
Of Counsel.

INDEX.

TABLE OF CASES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 40.

FRANK A. MUNSEY, PLAINTIFF IN ERROR,

vs.

WESLEY WEBB, ADMINISTRATOR OF THE ESTATE OF SAMUEL T. PENNINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This action was begun in the Supreme Court of the District of Columbia by the defendant in error, Wesley Webb, administrator of the estate of Samuel T. Pennington, deceased, against Frank A. Munsey to recover damages for the death of plaintiff's intestate, who was killed in an elevator accident in a building owned and controlled by Munsey in the city of Washington on the 15th of June, 1908. An appeal was taken to the Court of Appeals from a judgment rendered against the plaintiff in error, who is a defendant below. This judgment was affirmed by the Court of Appeals, and from that judgment a writ of error was brought to this

court. For convenience, defendant in error will hereinafter be referred to as plaintiff and plaintiff in error as defendant.

Plaintiff's intestate, who was a clerk in one of the Government departments, with offices on the seventh floor of the Munsey Building, entered said building on the morning of the accident and took passage in one of defendant's elevators for the purpose of being carried to his office on the seventh floor. Only one other passenger was in the elevator with decedent, and this other passenger left the elevator at the second floor. Clarence H. Peake, the operator of the elevator, was the only witness to the accident. The happening of the accident is described as follows by this witness:

> "The accident happened this way. Mr. Pennington and another gentleman entered the elevator at the first floor. The other gentleman got off at the second floor. I closed the door and started up—passed the third and fourth floors and was between the fourth and fifth when Pennington reeled and fell backward and was caught between the floor and the elevator; there is a space of, I judge, four or five inches between grating on the fourth and fifth floors. Pennington was caught just below the fifth floor; when I became aware that Pennington was about to fall I released the lever with my right hand and threw out my left in an effort to stop him from falling. * * * Pennington was standing about midway back in the car; I had not noticed anything wrong with him; the elevator gave no jolt or anything that might possibly have caused him to fall, and was running smoothly between fourth and fifth floors when he fell; the floor of the elevator was in good condition; there was nothing in there over which a man might fall; I do not know what caused Pennington to fall; I stopped the elevator within four or five inches after I saw Pennington falling" (R., 8, 10, and 11).

This is the only testimony in the whole record as to the accident. The defendant offered no testimony as to the

happening of the accident. There was therefore no dispute in the record as to the facts of the accident, nor, for that matter, was there any conflict upon any material point in the whole testimony.

The ceiling of the fifth floor was about a foot and a half in thickness; the distance between the floor of the car and the ceiling, when the car was on a level with the fifth floor, was about an inch and a half, and the distance from the car to the iron grill work or cage, which extended from the fourth floor to the ceiling, or lower edge of the fifth floor, was about three and one-half or four inches (R., 9 and 10).

The building and elevator were both new. There was an inner collapsible door upon the elevator itself in addition to the door of the cage, but there was no use for it except when the elevator was crowded, and it was not in use at the time of the accident (R., 10). The operator testified that he made every effort he could to stop Pennington's fall and that he did everything in his power to stop the elevator; *that he did stop it within four or five inches.* Decedent's head was crushed between the floor of the elevator and the fifth floor. That as soon as he saw Mr. Pennington in the act of falling he instantly released the lever. That the lever worked perfectly; it jumped back to neutral and stopped in the usual time (R., 21).

There was evidence adduced on behalf of the plaintiff by one Hanbury, elevator inspector of Baltimore, tending to show that the elevator was equipped with a switch, variously termed emergency, safety, knife, and potential switch, the location, operation, and effect of this switch being described by the witness (Rec., 16, 17); but there was no testimony by this witness or any other of plaintiff's witnesses showing or tending to show that the elevator could have been stopped more quickly by the use of this switch or in any other manner than it was in fact stopped *on this occasion* by Peake. The witness testified on cross-examination that to have stopped the elevator in four or five inches was "pretty good

activity," "out of the ordinary," was "unusually quick" (Rec., 18).

The elevator inspector of the District of Columbia, William I. Evans, a witness for the defendant, testified that the quickest possible way to stop the elevator was to release the lever. This is what was done by Peake, and the undisputed testimony shows that the elevator was stopped within four or five inches. There was, therefore, no substantial dispute in the testimony in respect to the car having been stopped with promptness. This witness further testified that to stop within five to eight inches, going up, was reasonable, but that to gear the machinery so that an elevator would stop within a less distance would injure the machinery and have a tendency to wreck the car (R., 28). The elevator in question was a modern Otis elevator (R., 24) and had been tested by the elevator inspector of the District of Columbia within three months before the accident and immediately after the accident and found to be in perfect condition on both occasions (R., 24, 25).

ASSIGNMENT OF ERRORS.

I.

The court below erred in affirming the action of the trial court refusing to direct a verdict for the defendant.

II.

The court below erred in holding that there was sufficient evidence to show that the elevator in question could have been stopped within a shorter distance than it was on this occasion.

ARGUMENT.

The crucial question in the case is whether or not the negligence of the defendant was the proximate cause of the injury resulting in the death of plaintiff's intestate, so that in the legal acceptation of that term it *caused* his hurt.

The law looks to the proximate and not to the remote cause. *"Causa proxima, non remota, spectatur."* A clear conception of the test which distinguishes the proximate from the remote cause is therefore the first and indispensable prerequisite to a true answer to the question which this case presents. By that test alone must the issue here ultimately be determined.

It is contended on the part of the plaintiff that the defendant was negligent in not having the projecting floors equipped with flares or fenders; that the inner door of the elevator was not closed; that the elevator boy did not have his arm extended across the open door; that the elevator boy was not instructed in the use of an emergency switch, with which the car was equipped.

Our contention is that the defendant is not liable in this case, first, because the negligent condition of the defendant's elevator complained of was merely the means of the injury suffered by the plaintiff's intestate, and not the proximate cause of said injury, the real—the moving—the efficient and proximate cause which intervened being the unknown thing which caused him to fall, and which, being absolutely unknown, cannot be imputed to this defendant, and, second, that the accident which happened to the deceased—his fall, when apparently in an entirely normal condition, alone in the car, except for the operator, and without apparent reason, but absolutely without any fault on the part of the defendant and consequent injury—was not the natural and probable consequence of the acts of negligence complained of and could not reasonably have been anticipated by the defendant as likely to occur by reason of such negligence.

These we believe logically to be two distinct objections and defenses to the plaintiff's claim, and that, subjected to either or both of these tests, his action must fail, but the two points are so closely and intimately connected and associated and have been so almost universally treated together by the courts that it will be necessary to consider them together in the citation of authorities which follows.

We contend that the cases cited in this brief show:

That where there is an intervening efficient cause, such intervening cause is the proximate cause of an injury, and, therefore, the responsible one.

That where an act could not have been foreseen nor anticipated as the result of an act of negligence it is not actionable.

And we contend that the facts in this case show:

That the fall of the plaintiff's intestate, for which defendant was not responsible, was the intervening efficient cause.

That the fall and injury of plaintiff's intestate when riding upon an elevator running smoothly and in perfect condition without apparent cause could not have been foreseen nor reasonably anticipated, when there was no evidence to show that such an accident ever had happened there or anywhere else before.

In Milwaukee, etc., R. R. Co. *vs.* Kellogg, 94 U. S., 469, this court says:

> "The question always is was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act and that it ought to have

been foreseen in the light of attending circumstances. * * *

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance of non-feasance. They are not where there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. *The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.* Here lies the difficulty. But the inquiry must be answered in accordance with common understanding."

In Ins. Co. *vs.* Tweed, 7 Wall., 44 (52), Mr. Justice Miller says:

"One of the most valuable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In Ins. Co. *vs.* Transportation Co., 12 Wall., 194, 199, Mr. Justice Strong says:

"But when there is no order of succession in time, when there are two main causes of a loss, the predominating, efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. * * * And certainly that cause which sets the other in motion and gave to it its efficiency for harm at the time of the disaster must be ranked as the predominant."

In Sheffer *vs.* Railroad Co., 105 U. S., 249, by reason of a collision of railway trains a passenger was injured, and becoming thereby disordered in mind and body he some

months thereafter committed suicide. It was held, in a suit by his personal representatives against the railway company, that as his own act was the proximate cause of his death, they were not entitled to recover.

> "The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends. The suicide of Sheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."

In Atchison, T. & S. R. Co. *vs.* Calhoun, 213 U. S., 1; 53 L. Ed., 671, the plaintiff, a child about three years of age, and his mother were passengers upon a train of the defendant railroad traveling to the town of Edmond, in Oklahoma. The train arrived at Edmond about eleven thirty o'clock at night, but the station was not called nor was Mrs. Calhoun notified by any of the trainmen that it was Edmond. She was, however, informed by other passengers of this fact after the train had stopped, and went out on the platform of the car to alight. Just as she reached the platform the train started and she handed the child to one Robertson, another passenger, who was then standing on the station platform. He took the boy, handed him to his son and returned to the steps of the car, telling Mrs. Calhoun not to jump off, as the train was running too rapidly. The plain-

tiff was landed without injury on the station platform and put in charge of Robertson's son by his father. Just then a young man named Jones took up the child in his arms, ran along by the car, which was moving, and attempted to return the child to its mother, who was standing on the platform of the car. After running seventy-five to one hundred feet to the end of the station platform, Jones stumbled over a baggage truck, which had been left on the platform near the rails, and this caused him to lose his hold of the child, who fell under the car and was injured. The station platform was dimly lighted and no employee of the defendant rendered Mrs. Calhoun or her boy any assistance in leaving the train or gave them any warning.

The jury was instructed that the plaintiff might recover if it found that the company was guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and that such condition directly and proximately contributed to the injury. It did so find, and a verdict was rendered for the plaintiff, from which the defendant appealed. This court reversed the judgment, saying:

> "Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life. *In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother.* Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word 'cause' when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes

and, in ascertaining which is proximate and which remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. Louisiana Mut. Ins. Co. *vs.* Tweed, 7 Wall., 44, 52; 19 L. Ed., 65, 67. * * * Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. * * * *But, even where the highest degree of care is demanded still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight.* It has been well said that, 'if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things. Pollock, Torts, 8th ed., 41.

"In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. On the other hand, if it had been left a mile from the station, where, by no reasonable hypothesis, passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track

at the station, 100 feet, more or less, in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increased rapidity; much less that a person would take a helpless infant, and, while thus running, attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed."

This doctrine is stated as the true rule by the foremost text writers. Speaking of this rule, Sir Frederick Pollock, in his work on the law of Torts, says:

"The doctrine of 'natural and probable consequences' is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight. It has been defined as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, no human affairs could be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable nor waste his anxiety upon events that are barely possible. He will order his precautions by the measure

> of what appears likely in the known course of things. This being the standard, it appears that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

Judge Cooley, in his work on Torts, vol. 1, 3d edition, page 99, with characteristic exactness has summarized the rule as follows:

> "It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded; and in the application of it the law rejects as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote, cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: 'If the wrong and resulting damage are not known by common experience

to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficienctly conjoined or concatenated as cause and effect to support an action (Addison on Torts).'"

As a corollary to this postulate he says (page 101):

"When the act of omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause."

Mr. Wharton says:

"Supposing that had it not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." Whart., Neg., 134.

Federal Court Cases.

In Cole *vs.* The German Savings & Loan Society, 124 Fed., 113, in the Circuit Court of Appeals for the Eighth Circuit, and before Judges Sanborn, Thayer, and Van

Devanter, the sole question presented was whether the negligence of the defendant was a proximate cause of the plaintiff's injury. The facts briefly were these: The plaintiff, a lady of thirty-two years of age, entered the hall of the building of the German Savings & Loan Society for the purpose of riding on an elevator to the upper story. The well of this elevator was about forty feet distant from the entrance to the hall, into which it opened. The door of the shaft was at the time standing open about ten inches. As the plaintiff passed through the hall, a boy who was a stranger to her, and who was not employed by or authorized to act for the defendant, but who had endeavored to operate the elevator on a previous occasion, hurriedly passed the plaintiff, seized the sliding door to the elevator shaft, pushed it back as far as it would go and stepped back. The elevator was at an upper story in charge of its operator. The plaintiff supposed that the strange boy was the operator of the elevator, stepped into the shaft, fell to the bottom and was seriously injured. The hall was dark and gloomy. There was no artificial light in the hall at the time of the accident. The door to the shaft was furnished with a hook which, when the door was closed, entered a slot and grasped the bar. But the door could be opened from the outside even when it was latched by lifting it and pushing it back. When the employee in charge of the elevator jammed the door it would bound back and slide open from one to ten inches.

Upon this state of facts the lower court directed a verdict for the defendant. On appeal this ruling was affirmed, the court in its opinion saying:

> "An injury that is the natural and probable consequence of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but

that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. A natural consequence of an act is the consequence which ordinarily follows it—the result which may be reasonably anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it. * * *

"No act contributes to an injury, in the legal acceptation of that term, unless it is a proximate cause of that injury—unless that injury could and ought to have been foreseen or reasonably anticipated as its probable consequence. The conclusion inevitably follows that the concurring negligence of the trespasser in this case does not answer the primary question which the action presents. It leaves it entirely undetermined, and that question still recurs. Was the injury of the plaintiff the natural and probable result of the acts or omissions of the defendant? Let us see.

"That negligence consisted of permitting such a degree of darkness in the hall opposite the door which opened into the well of the elevator that it was difficult to see whether or not the elevator was there; of allowing boys to visit in, ride upon, and sometimes to operate the elevator; of allowing the boy who opened the door to the well to ride and visit in the elevator about a dozen times, and to endeavor to operate it at least once; of neglecting to provide a lock for the door which would prevent any one from opening it from the outside; and of permitting the door to stand open from one to ten inches. The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that her entrance and fall in the well were the natural and probable consequence of these acts of negligence committed by the defendant. If she failed to successfully bear this burden, she was entitled to no damages from the Savings & Loan Society. Chicago,

St. P., M. & O. Ry. Co. *vs.* Elliott, 55 Fed., 949; 5 C. C. A., 347; 20 L. R. A., 582; Union Pac. Ry. Co. *vs.* Callaghan, 56 Fed., 988, 993; 6 C. C. A., 205, 210. Where is the evidence to sustain such a conclusion? *The best evidence upon such an issue is the testimony of experience, because what has been is our best guide to what will be. The challenged acts and omissions of the defendant had been in operation for many months. If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural tendency. If they had produced no such result the counter presumption was not less strong.* * * *

"The independent voluntary act of the strange boy who opened the door of the elevator and invited the plaintiff to enter the well was incapable of anticipation. No one could have foreseen it as the probable consequence of the acts or omissions of the defendant. *It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt,* and imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damages which resulted from it. The acts and omissions of the defendant were too remote to legally contribute to the injury or to impose liability for it. They were not a proximate cause of the accident, and the mischievous and wrongful act of the strange boy was the sole moving efficient proximate cause that produced it."

The case of Zopfi *vs.* Postal Telegraph Co., in the Circuit Court of Appeals for the Sixth Circuit, reported in 60 Fed., 987, involves the very principle of law involved in this case, and the state of facts is so similar that it makes the opinion doubly valuable in this inquiry. Mr. Justice Lurton sat in that case. The facts were as follows:

Defendant company undertook to erect a telegraph line on the turnpike road between Nashville and Gallatin, Tennessee. The poles, which were to support the wires, were

placed along the turnpike at or near points where they were to be erected. The plaintiff, who was a minor, and was thirteen years of age at the time of the injury complained of, lived with her father upon the Gallatin pike, about three miles from Nashville. There was a pathway leading from her home to the pike. At a point where this path reached the pike there was a gate. There was a strip of the public road, of about ten feet, between this gate and the metaled portion of the pike. Across this strip the pike was approached over a platform about four feet in length, and then by stepping-stones. This strip, especially in rainy weather, was covered with water and mud. One of the poles mentioned was placed lengthwise along the turnpike, so that its large end extended along about one-half to two-thirds of the side of the platform at the gate, about a foot or more from the platform, and covered the stepping-stone, or nearly all of it, next to the platform. The distance from the stepping-stone which could be used was thirty-three inches. The day was very rainy and the end of the platform across which the pole did not extend could not be reached except by going through water and mud. The plaintiff, when returning from school, reached the stepping-stone next to the pole, stepped over the pole without touching it to the platform, when her foot slipped and she fell backward upon the pole, and by her contact therewith and her fall she was seriously and permanently injured. The trial court directed a verdict for the defendant. Upon appeal the Circuit Court of Appeals held that unless the plaintiff's *fall* was caused or occasioned by the defendant's negligence in leaving the pole across the road there could be no recovery, as such negligence would not be the proximate cause of the injury. The court says:

> "It is urged on behalf of plaintiff that, though the pole may not have been the proximate cause of the fall of the plaintiff, it was the proximate cause of her injury, and, as the pole was left there by the negligence of the defendant, it is liable, and that

whether this is so, or not, should have been left to the jury to decide.

"What are proximate or remote causes of injury, or what are proximate or remote damages for injuries, are subjects involved in much confusion and conflict by the decisions of courts and the dissertations of law writers. Wharton says:

> "'A negligence is the juridical cause of an injury, when it consists of such an act or omission on the part of a responsible human being as, in ordinary, natural sequence, immediately results in such injury.'

"He further says:

> "'At this point emerges the distinction bebetween conditions and causes; a distinction, the overlooking of which has led to much confusion in this branch of law. What is the cause of a given phenomenon? The necessitarian philosophers, who treat all the influences which lead to a particular result as of logically equal importance, and who deny the spontaneity of the human will, tell us that the cause is the sum of all the antecedents. Thus, for instance, a spark from the imperfectly guarded smoke pipe of a locomotive sets fire to a haystack in a neighboring field. What is the cause of this fire? "The sum of all antecedents," answers Mr. Mill, the ablest exponent of necessitarian philosophy. Apply this concretely, and it would be difficult to see how any antecedent event can be excluded from taking a place among the causes by which the fire in question is produced. Certainly, we must say that either if the railroad in question had not been built (an event depending upon an almost infinite number of conditions precedent, among which we may mention the discovery of iron, steam, and coal), or the haystack in question had not been erected (to which there is also almost an infinite number of necessary antecedents, the failure of any one of which would have in-

volved the failure of the haystack), no fire would have taken place. Jurisprudence, however, does not concern itself with refinements such as these. Its object is to promote right and redress wrong; and, without undertaking to propound any theory of the human will, it contents itself with announcing as a fact, established by experience that, by making a law that a human "antecedent" shall be punishable for a wrongful act, such "antecedent," if not restrained from committing the wrong, may be compelled to redress it. The question, therefore, when an injury is done, is whether there is any responsible person who could, if he had chosen, have prevented it, but who, either seeing the evil consequences, or negligently refusing to see them, has put into motion, either negligently or intentionally, a series of material forces by which the injury was produced. This is the basis of the distinction between conditions and causes. We may concede that all the antecedents of a particular event are conditions without which it could not exist, and that, in view of one or another physical science, conditions not involving the human will may be spoken of as causes. But, except so far as those conditions are capable of being moulded by human agency, the law does not concern itself with them. Its object is to treat as causes only those conditions which it can reach, and it can reach these only by acting on a responsible human will. It knows no cause, therefore, except such a will; and the will, when thus responsible, and when acting on natural forces in such a way as through them to do a wrong, it treats as the cause of the wrong. As a legal proposition, therefore, we may consider it established that the fact that the plaintiff's injury is preceded by several independent conditions, each one of which is an essential antecedent of the injury, does not relieve the person by whose negligence one of these antecedents has been produced from liability for such injury. On the other hand,

> the fact that a party is shown to have been negligent in a particular proceeding does not make him liable for an injury produced by conditions to which his negligence did not contribute.'

"*Regarding these principles as sound, it follows that the liability for the plaintiff's injury depends upon the cause of her fall. If the pole was the cause of her fall, or one of the causes which made her fall, the defendant is liable for the injury, for the fall is the juridical cause of the injury.* * * * (Italics ours.)

"The question for determination in this case is, Ought the case, under the circumstances and facts proven, to have been submitted to the jury, as to whether the pole caused plaintiff's fall, or contributed to that result? In coming to a conclusion as to this, we are to take such legitimate view of the proof as is most favorable to the plaintiff. It is stated in the testimony that the stepping-stone next the pole and the platform were upon the same grade, or nearly so, and upon the same grade as the surface of the pike between the stepping-stone and the platform; that the distance between the stone and the platform was 33 inches; that the pole with which defendant obstructed plaintiff's passway was between the stepping-stone and the platform, and was 18 inches in diameter at the point of obstruction. And consequently the plaintiff (a girl 13 years of age) was required, in taking the step to the platform, to raise her foot one foot and a half above the grade of the stepping-stone and surface of the pike and platform, in making the step to the platform. The pole was peeled, and necessarily wet and slippery. The girl cleared the pole. Such a step as she must have taken was long, awkward to make, and unusual in its character. When she stepped upon the platform with her advanced foot, a jury might reasonably infer that her hindmost foot had left the stepping-stone, for if it had still been placed upon the stone when the foot upon the platform slipped, and she fell, she would have fallen forward or astride the pole, and not back-

> ward, and it is not an unreasonable inference that she had to jump or spring so as to clear the log and reach the platform. We do not say that the facts and inferences here given are true. We only say that there is testimony in the record to sustain such a view, while there are other facts and circumstances proven, from which contrary conclusions and inferences may be drawn. It is not our province to venture an opinion as to whether the testimony weighs more upon one side or the other, but we believe that, taking the testimony all together, and looking to the facts, circumstances, and conditions surrounding the transactions, it ought to have been left to the jury to consider and determine *whether the pole which obstructed the passway caused, or contributed to cause, the fall of the plaintiff*, and the judge erred in failing to do so. For this error the cause will be remanded, with directions that the verdict and judgment be set aside, and a new trial awarded, and it is so ordered."

It is to be noted that while there was some evidence in this case from which the jury might find the plaintiff's *fall* was in fact caused by the negligent leaving of the pole on the highway, in the case at bar there was absolutely no evidence from which it could even be inferred that the fall of plaintiff's intestate was caused by any act of negligence on the part of the defendant.

Applying the principles of the Zopfi case, did not defendants' liability depend upon the *cause of Pennington's fall?* Was not the *fall* the *juridical cause* of his injury? And what evidence was there in the case that defendant had caused Pennington's fall?

The Court of Appeals says:

> "The car was moving at a normal rate of speed. No jerk or jar occurred in its movement to throw deceased from his place. *His fall was not caused from any act of defendant or his employees, or from any defect in the elevator itself*" (Rec., 34).

And this statement is entirely borne out by the record.

Is it not clear that defendant's act was neither the cause nor one of the causes of Pennington's fall, and therefore not the juridical or proximate cause of the injury?

In the case of Teis *vs.* Smuggler Mining Company, decided by the Circuit Court of Appeals, Eighth Circuit, reported in 158 Fed., 260, Judge Van Devanter sitting, the facts were as follows:

The plaintiff was an employee of the defendant, working in its mine, where he had been for twelve or fourteen months prior to the accident. There was always more or less gas escaping in the mine, and on the afternoon of the accident it manifetsed itself in sufficient quantity to make it uncomfortable to the plaintiff and his fellow-workman, one Crozier. Plaintiff and Crozier had gone into the mine with a horse and train to secure ore, and upon their failure to return to the surface a searching party went to look for them. Plaintiff was found unconscious and face downward on the ground near the tramway track, with Crozier lying on top of him dead. There were two methods of egress from the place where they were found—one out by the tunnel through which the tramway ran, some 500 or 600 feet; the other by means of an elevator which was much nearer to the place. The rescuers carried the plaintiff to the elevator, which was a square cage about five and a half feet wide between the sides, two of which were closed and the other two open. The shaft, of course, was larger, with heavy timbers. There was no light in the elevator, except, perhaps, the customary lamps on the miners' hats or caps. *Plaintiff was laid on the floor of the elevator and, according to the testimony of the rescuers, he did not move before the surface was reached.* When they reached the surface it was discovered that one of the plaintiff's legs was broken at the ankle. *The principal question in this case was whether defendant's alleged negligence in permitting the escape of gas in the mine was the proximate cause of the plaintiff's in-*

jury. The Circuit Court directed a verdict for the defendant and upon appeal its judgment was affirmed. The court said:

> "Without undertaking to review the mass of authorities bearing on this vexed question, it is sufficient to say that they range themselves along two lines, closely allied, but more or less divergent. The one asserts that when several concurring acts or conditions of things—one of them the wrongful act of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, it is the proximate cause of the injury. From this postulate the plaintiff's counsel argues that but for the gas in the mine the plaintiff would not have been rendered helpless, so as to have been exposed to the supervening negligent act of the men in so placing him in the elevator cage as to leave his leg extending beyond the outside thereof, whereby it came in contact with the timbers; and therefore the negligent act of exposing him to the gas was a continuing, unbroken cause. This, it seems to us, is the argument *post hoc, proctor hoc. It runs back to the first wrongdoer, no matter how many supervening or intervening causes. It admits of no break in the chain of causation, because it is builded on the presumption that but for the first negligent act the person injured might not have come into the position where the supervenient cause, although put in motion by a force entirely independent of the first, smote the party to his injury.* Carried to its logical sequence, where A. should wrongfully eject B. from his house at a time when the sky was clear, if a storm should suddenly arise and a flash of lightning should kill B., his death would be the proximate cause of the act of ejection. Opposed to this doctrine is the line of authorities asserting the rule to be that, where the negligent act of the defendant is not wanton, the law attaches responsibility to it for all the consequences which ensue therefrom, and for such effect as, in the natural order of sequence, follows therefrom, no matter how remote in point of time or distance, limited by the requirement that the ultimate result must be such as that a reasonable person should anticipate that in the natural order of things would probably

ensue. Whenever this causal connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force or human agency, acting independently of the first negligent act, but for which the ultimate injury would not have come, the former is the remote and the latter is the proximate cause. This is very aptly expressed by Wharton thus:

> "'The intervener acts as a non-conductor and insulates the negligence.' * * *

"Without adverting to the accordant decisions of State and Federal courts in other jurisdictions, it is sufficient to say that the rule above declared has been recognized and applied in this circuit. Railway Company *vs.* Elliott, 55 Fed., 949; 5 C. C. A., 347; 20 L. R. A., 582. In the more recent case of Cole *vs.* German Savings & L. Association, 124 Fed., 113; 59 C. C. A., 593; 63 L. R. A., 416, known as the 'Elevator Case,' the facts of which are quite familiar, Judge Sanborn reaffirmed the rule expressed in the syllabus:

> "'An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause, of the injury.'

"A discriminating observance of the foregoing distinction between the proximate and remote cause would have prevented some confusion in the authorities, and greatly simplified the solution of seemingly complicated facts of the particular case.

"Turning to the case in hand, it may be conceded that the mine owner might be held to have reasonably anticipated that permitting gas to flow in the mine, a workman exposed thereto might be overcome

and rendered unconscious. It might also be conceded that it would not be an unnatural course to pursue by the men, on discovering the plaintiff prostrate in the mine, to carry him to the elevator as the shortest and quickest method of taking him to the surface for restoration. It may further be conceded, for the purposes of this case, that with the knowledge the defendant had of the construction of the elevator and its mode of operation, a disabled man would, in the passage to the surface, be exposed to the usual and ordinary incidents of such mode of carriage. Beyond question, the defendant could be held liable for any injury to the lungs and the general health of the plaintiff traceable directly to his exposure to the gas. But here its responsibility would end. The elevator from side to side was about 5½ feet, nearly the length of an ordinary man. As it was square, there was ample room between the transverse corners in which the plaintiff could have been laid without his leg extending over the side of the elevator. And had he been, with ordinary care, laid crosswise at full length his feet would not have extended outside of the elevator over two or three inches. *In the absence of any knowledge, so far as this record discloses, on the part of the defendant that any person carried up the elevator had ever had his feet or legs injured by coming in contact with the wall of the shaft, would it be within the range of reasonable probability that the company should be held to have reasonably anticipated that the rescuers would so carelessly dump the plaintiff in the car as to leave his leg unnecessarily protruding beyond the elevator, and thereby be broken by coming in contact with the wall of the shaft?*

"It cannot be said that, if the plaintiff had not been rescued at the time he was, he would have died. The fact that Crozier, who lay above him, was dead, and that the plaintiff, whose face was to the ground, was still living, would indicate that the gas was not so deleterious next to the earth. And that the gas had measurably spent its destructive force at the time the plaintiff was discovered is evidenced by the fact that the rescuing party carried him without inconvenience to themselves on account of the presence of

gas, and that they returned thereafter and brought up the body of Crozier. The horse was also discovered near by and was led out by the length of the tunnel by one of the employés, without injurious result. Suppose that the rescuing party had thought it the better course to have carried the plaintiff out to the open through the tunnel, and to that end had placed him on the ore car; but in their haste they left his leg hanging over the edge of the car, and the horse drawing the car towards the mouth of the tunnel had become frightened, or from viciousness, had kicked the plaintiff and broken his leg, would that have been a probable result that the defendant should have been held to have reasonably anticipated from the plaintiff's exposure to gas in the mine? This very situation is aptly illustrated by the case of Roedecker *vs.* Metropolitan Street Railway Company, 87 App. Div., 227; 84 N. Y. Supp., 300, where the plaintiff, under the direction of the conductor, rode on the front platform of a horse car. Through the negligence of the company respecting the track the horse fell, which stopped that car. The car was moved backward so that the horse could be released, and, when released, it kicked the plaintiff, who was standing on the platform. It was held that the driver's negligence ended with the fall of the horse, and therefore the injury was not the proximate cause of the negligent act. After adverting to the lack of harmony in the decisions, the court said:

> "'The principle to be evolved from their consideration is that, although a situation may be produced by negligence, it is only for injuries which probably, naturally, or necessarily flow from such negligence, without the intervention of another and a distinct cause or agency, that the author of the negligence can be held liable; and this would exclude injuries resulting from another, subsequent, different, and independent cause. * * * We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury and that without which the injury could not have happened.

> * * * If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible.'

"When the plaintiff was carried to the surface of the mine, and the doctor had placed him on a table for examination, had some third party carelessly struck a leg of the table and overturned it, whereby the plaintiff's leg would have been broken, could it be said that that was the natural or probable result of the presence of gas in the mine, which the defendant should be held to have anticipated? The breaking of the plaintiff's leg was such an abnormal, extraordinary incident, through the carelessness of the men who carried him up the elevator, as to exclude it from the range of reasonable probability as the result of the gas in the mine. It was a result that might not have happened in a thousand repetitions of the act of carrying him up the elevator. As well say, if his rescuers had abstracted his pocket-book or watch, while he was comparatively unconscious and helpless, the defendant company should be held liable because he was rendered helpless by the gas, and that that was the first and continuing unbroken cause. The law is that in all the relations and transactions of business life we have the right to assume that others will perform their duty and discharge their undertakings in a reasonable, prudent and careful manner. We are not held to assume that injury will come as the result of the carelessness or incautiousness of others.

"The final contention on behalf of plaintiff is that the question of proximate and remote cause should have been submitted to the determination of the jury. Where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury; but where, as in this case, there is no dispute about the facts, and the law pronounces the judgment of the facts established, it is the province and duty of the court to direct the verdict. This

has been so ruled in respect of this character of action. Hoag *vs.* Lake Shore & M. S. Ry. Co., *supra;* S. S. Pass Ry. Co. *vs.* Trich, *supra;* Goodlander Mill Company *vs.* Standard Oil Company, 63 Fed., 400, 407; 11 C. C. A., 253; 27 L. R. A., 583; Cole *vs.* German Savings & L. Association, *supra.*"

In Empire State Cattle Co. *vs.* Atchison, 135 Fed., 135, the court says:

> "Under the undisputed evidence what was the direct, efficient and proximate cause of the loss sustained by the plaintiff? The defendant contends 'the act of God.' The plaintiff contends 'the negligence of the defendant.' Which contention is correct?
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> "It is not enough in this case that plaintiff show that some act of negligence of the defendant furnished the occasion for the loss or that some act of negligence of the defendant contributed to the injury; but before plaintiffs may recover in these actions it devolves upon them to trace the loss which they have sustained to the negligence of the defendant as direct and proximate cause of the injury.
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> "While the authorities of this country are not in harmony upon this proposition, yet the Federal decisions all agree therein. (Citations.) * * * As to whether the act of defendant in bringing cattle to Kansas City and there leaving them in the stockyards constitutes such negligence as was the proximate cause of the loss to plaintiff, must be measured, not in the light of subsequent events and as we see them today, but by what a person of ordinary care, skill and prudence would have done in his own affairs, with the knowledge of circumstances and conditions as they were or should have been known to him at that time to exist."

In Butts *vs.* Rwy. Co., 110 Fed., 329, the Circuit Court of Appeals for the Sixth Circuit, before Judges Lurton, Day, and Severance, a question of proximate cause was presented and the court held that the question of whether or not the injury could have been anticipated was the proper way to

arrive at a solution of the question. The facts were that a passenger, being notified that the car that he was on was to be cut from the train, started forward, and, as he was crossing to the next car, the separation took place, and as he took hold of the door-knob of this car the brakeman called, "Look out," "Look out"; whereupon, acting upon a sudden impulse that there was danger in front, he stepped back and fell between the cars. *Held*, that neither want of time to go to the forward car nor the giving of the signal to "look out" was the proximate cause of the accident, *but the plaintiff's own independent act in stepping back* from a position of safety. The opinion is by Judge Lurton and he says in part:

> "When an act complained of as the proximate cause of injury to another is not in itself wanton, and the result is not that which might reasonably have been anticipated as a natural and probable effect, there is no actionable negligence." (Citation.)

In Chicago, etc., Rwy. Co. *vs.* Elliott, in the Circuit Court of Appeals, Eighth Circuit, 55 Fed., 949, the court said:

> "Again, an effect is sometimes the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate or moving cause; in other words, it is an accident—a result that no one knowing the circumstances before the catastrophe could have reasonably anticipated. If an injury is the result of such an accident, or if the plaintiff fails to show that the negligence with which he charges the defendant was the proximate cause of the injury, there can be no recovery in his favor. * * *
>
> "The natural consequence of an act is the consequence which ordinarily follows from it—the result which may reasonably be anticipated from it."

In Goodlander *vs.* Standard Oil Co., 63 Fed., at page 400, in the Circuit Court of Appeals for the Seventh Circuit, the facts were briefly as follows:

Defendant shipped a carload of crude petroleum in an oil car which had no valve regulating the outflow of oil. The consignee had the car removed to the side track and then attempted to draw off the oil near the plaintiff's mill, the engine room of which was lower than the track. Owing to the absence of the valve the oil ran out so rapidly that it flowed into the plaintiff's engine room, exploded and destroyed the mill. It was held that the failure to have a valve was negligence, but that the defendant was not liable therefor since this negligence was not the proximate cause of the injury. In its opinion the court says:

> "The proximate cause of an injury is that cause which, in the natural continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.
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> "In Insurance Co. *vs.* Boon, 95 U. S., 117, 130, the court says:
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> > "'The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.'
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> "The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, a cause of the injury—an antecedent cause; but where the negligent act is not wanton or *malum in se*, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency; and, as Mr. Wharton expresses the thought, 'the intervener acts as a non-conductor, and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury

and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction. If, but for such interposition the defendant's negligence would have produced no injury, the causal connection is broken, because *the intervening act made the act of negligence, otherwise innocuous, operative to injury.* The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances. * * *

"The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the Boon case, above referred to, the incidental cause, or the instrument of a superior and controlling agency, and was therefore not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion? So here the gas company had received this oil into its possession. It was entirely harmless in and of itself. The natural and probable consequence of the negligent act or omission charged upon the defendant was the leakage and loss of the oil. The omission of the valve did not render it dangerous. If not interfered with, the omission of the valve had no tendency whatever to produce the injury complained of. The petroleum was subject to ignition, and its ignition at the time and place produced the injury. That was caused by subjecting it to contact with heat and fire. That was done by the gas company, which had possession and control of the oil, and acted independently, and not under the direction of the defendant. The company was chargeable with knowledge of the properties of petroleum, and had actual knowledge, through its servants, that the oil was leaking from the discharge pipe, and this prior to the removal of the car

from the yards of the carrier. With this knowledge, the company placed the car within three feet of the engine and boilers of a mill located below the grade of the railway, and with knowledge of the leakage, sufficient, in view of the dangerous proximity of fire, to place a careful person upon diligent inquiry, undertook to discharge the oil in close proximity to hot ashes, and near an open window of the boiler room. We cannot say that the negligent omission of the valve 'necessarily set the other causes in operation'; nor can we say that the injury was the natural and probable consequence of the negligent act. In marshaling the probable consequences which ordinary sagacity should have foreseen as probably resulting from the omission of the valve, it would, as we conceive, appear unlikely and abnormal that this injury should result. We are of opinion that the intervening and independent act of the gas company was the efficient cause, self-operating, by which the negligent act of the defendant was rendered ineffective to an injury that was not the probable and natural consequence of the act. Hoag *vs.* Railway Co., 85 Pa. St., 293; Carter *vs.* Towne, 98 Mass., 567; Scheffer *vs.* Railroad Co., 105 U. S., 249; St. Louis I. M. & S. Ry. Co. *vs.* Commercial Union Ins. Co., 139 U. S., 223; 11 Sup. Ct., 554." * * *

"We are of opinion that if, upon the facts presented, a jury had rendered a verdict for the plaintiff, it would have been the duty of the court to set aside the verdict, and that, therefore, the court below rightly directed a verdict for the defendant, and that the judgment must be affirmed."

In American Bridge Co. *vs* Seeds, 144 Fed., 609, in the Circuit Court of Appeals for the Eighth Circuit, a bridge company so constructed false work for the rebuilding of a bridge and rails parallel to and outside of the bridge for a traveler, which carried blocks and tackle and other machinery, that there was a space nine feet wide between the traveler runs and stringers on the side of the bridge. Loose planks twelve feet apart extended from the stringers to these rails. The foreman of the plaintiff's gang ordered him to

cross from one of the traveler runs to the stringer and hitch the runner of the tackle to some iron cords. He did so, and started back across the open space upon a plank; but before he had crossed, the foreman gave to the man, who operated the blocks and tackle by means of an engine, a signal to raise the load rapidly, and as it was raised it swung against the plaintiff and the plank and knocked them to the ice below, injuring the plaintiff. It was held that the proximate cause of the accident was the inopportune signal of the foreman, the risk of which was assumed by the plaintiff, and not the negligence of the master in failing to provide a safe place in which to work.

> "It is not conceded that the alleged omissions of the defendant constituted any breach of its duty to the plaintiff to exercise ordinary care to provide him a reasonably safe place in which to do his work. But, if they had constituted such a breach, it is not perceived how they could sustain a judgment against the bridge company for an injury caused by the negligent act of another, which it did not induce and could not have foreseen. The test of liability in cases of alleged concurring negligence, like the one in hand, is the same as in all other actions for negligence. It is the true answer to the question: Was the injury the natural and probable consequence of the acts on which the action is based? Was it reasonably to be anticipated from them? If it was, the action may be maintained, although the negligence of another concurred to produce it.[5] The burden of proof was upon the plaintiff to establish a state of facts which would naturally lead to the conclusion that his fall was the natural and probable consequence of the loosely planked space and of the absence of the snub rope. *The only evidence upon this subject was the evidence of experience. These omissions never did cause a fall. None ever occurred until a new and independent force, the careless signal of the foreman, sent the swinging load against the plaintiff and threw him to the ice below.*"

* * * * * * *

"The independent voluntary act of the foreman who gave the reckless signal which sent the iron cords against the plaintiff and knocked him off the bridge was a breach of his duty incapable of anticipation. This act of an independent human agency broke the chain of causation between the prior alleged negligence of the defendant and the injury of the plaintiff, insulating its omissions from the plaintiff's hurt, and discharged the defendant from all liability for it. Cole *vs.* German Sav. & Loan Soc., 59 C. C. A., 593, 600; 124 Fed., 113, 120; 63 L. R. A., 416; Railway Company *vs.* Kellogg, 94 U. S., 469, 475; 24 L. Ed., 256; Insurance Co. *vs.* Boon, 95 U. S., 117, 130; 24 L. Ed., 395; Goodlander Mill Co. *vs.* Standard Oil Co., 63 Fed., 400, 405; 11 C. C. A., 253, 258, 259; 27 L. R. A., 583; Chicago, St. P., M. & O. Ry Co. *vs.* Elliott, 55 Fed., 949, 951; 5 C. C. A., 347, 349; 20 L. R. A., 582. The case presents no evidence to sustain the conclusion that these omissions were a proximate cause of the accident to the plaintiff."

"An injury that could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable. An injury that is not the natural consequence of an act or omission, that would not have resulted but for the interposition of a new and independent cause, is not actionable." (Citation.)

Little Rock, etc., R. R. Co. *vs.* Barry, 84 Fed., 930.

In St. Louis, etc., *vs.* Bennett, 69 Fed., 528, it is said:

"Their injury and death were not the natural and probable consequence of running a freight train against standing cars upon this spur track. This result would not have followed had it not been for the unexpected intervention of a new and independent cause, that they could not foresee—the voluntary descent of these unfortunate workmen upon this track without notice. But an injury that could not have been foreseen or anticipated as the probable result of an act of negligence is not actionable, nor is an

> injury that is not the natural consequence of the negligence complained of and would not have resulted from it but for the intervention of some new and independent cause." (Citation.)

If in the case at bar Pennington had been pushed by a third person upon the elevator, there would be no question that it was an independent act intervening between the wrong and the injury. Surely it can make no difference in principle that instead of being pushed by a third person his fall was his own independent act—occasioned through no fault of the defendant. Surely the defendant would not be any more responsible for the fall in the one case than in the other, nor could it have been any more reasonably anticipated by him. That the principle is the same in both cases seems too clear to require argument.

State Court Cases.

In Cleghorn *ex.* Thompson (Kan.), 54 L. R. A., 402, the defendant was shooting at a dog and in some manner the bullet became deflected and struck and killed plaintiff's intestate. It was held that the defendant was negligent in shooting as he did, but no wantonness or *malo animo* was charged. It was held that the defendant could not have foreseen or anticipated the deflection of the bullet and the injury to plaintiff's intestate, and that therefore there was no liability. The court says:

> "Where a man, proceeding in a lawful business, exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon free-

dom of action as materially to check human enterprise.

"We may say, then, that negligence, to be actionable, must result in damage to some one, which result under all the circumstances, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. There are very few, if any, of the injurious things that occur in human life but what may be traced back along the line of causation, and located in an act of omission or commission of some one else. We cannot be freed from the results of living in communities. There are some of those injurious results which may be directly traced, and for which the law and common consent make the author responsible. There are others which come out of the complex relationships of life, and which the law and common consent denominate 'accidents,' and relieve the author, near or remote, from liability. We deem the injury of which the defendants in error in this case complain to be one of these."

In Stone *vs.* Boston & A. R. R. Co. (Mass.), 51 N. E., 1; 41 L. R. A., 794, the facts of the case are as follows:

Defendant's railway depot, freight house, and platform used mostly for storing oil were situated across the street from plaintiff's buildings. The platform had become thoroughly saturated with oil leaking from the barrels. A teamster, not connected with the defendant, brought goods to be shipped by it, and in lighting his pipe threw a match on the ground underneath the platform, which immediately caught fire, and with it the oil standing on the platform, destroying the plaintiff's buildings, as well as those of the defendant. All the oil had been on the platform for a longer time than forty-eight hours, which was prohibited by law. Plaintiff's buildings would probably not have been burned if there had been no oil on the platform. *Held*, that the fire resulting from leaving oil on the platform could not be apprehended by defendant, and, its acts not being the proximate cause of the fire, plaintiff could not recover.

"The rule is very often stated that, in law, the proximate, and not the remote, cause is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being had intervened between the original cause and the resulting damage, the law will not look back beyond him. * * * (Citations.)

* * * * * * *

"It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case in Lane *vs.* Atlantic Works, 111 Mass., 136, where it was found by the jury that the meddling of young boys with a loaded truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion of Mr. Justice Colt the court says: 'In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence will remain a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be *anticipated*, not in the number of subsequent events and agencies which might arise.' According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of

> the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was a probable; that is, likely to occur according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable."

Huber *vs.* La Crosse Ry. Co. (Wis.), 31 L. R. A., 583, was a case where an electric wire connected with a trolley pole of defendant's line had been allowed to become charged with electricity, the wire in question being extended in close proximity to an electric light pole. A workman engaged in moving electric lamps was injured by coming in contact with the wire. Plaintiff had climbed a wooden pole supporting the electric light, but would not have been injured unless he had come in contact at the same time with the charged wire and the iron pole supporting the wire, thus making a short circuit. The case was submitted to the jury, which rendered a verdict for the plaintiff, but upon appeal the Supreme Court of Wisconsin reversed the judgment upon the ground that the alleged negligence of the defendant in allowing the wire to become charged with electricity in close proximity to the electric light pole was not the proximate cause of plaintiff's injury. The court said:

> "The negligence is not the proximate cause of the accident unless, under all the circumstances the acci-

dent might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. Atkinson *vs.* Goodrick Transp. Co., 60 Wis., 141, 163; 50 Am. Rep., 352; Barton *vs.* Pepin County Agri. Soc., 83 Wis., 19; McGowan *vs.* Chicago & N. W. R. Co. (Wis.), 64 N. W., 891. A mere failure to ward against a result which could not have been reasonably expected is not actionable negligence. Whether the negligence of the defendant was the proximate cause of the injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference from undisputed evidence is in doubt.

* * * * * * *

"Could the defendant have reasonably anticipated, under these circumstances, the occurrence of an accident such as this? Ought the defendant to have foreseen it, in the light of attending circumstances? We think not. It clearly appears that the use of the wooden pole in climbing up or coming down was not dangerous, nor was it possible for the plaintiff, while climbing or clinging to it, to have received a shock even by touching the charged span wire, unless he completed the circuit, at the same instant, by touching the iron post with his naked hand or person. The defendant had no right to expect that an inexperienced operator would have climbed to such a point much less that of an experienced and competent one, with his knowledge of the situation, at the only possible point of danger with the warning of the circuit break before him, would practically eliminate it as a means of safety, and, by placing his body substantially in its place, complete the electrical circuit, so that the current would necessarily pass through his body. It was not expected that he would have occasion to touch or come in contact with the span wire beyond the circuit break, or the iron post, for any purpose, and certainly not so as to complete an electrical circuit with his body."

In Herr *vs.* City of Lebanon, 149 Pa. State, 222, the plaintiff was a passenger in an omnibus which ran along the street of defendant city. The street was twenty feet wide and in good condition. The horse drawing the omnibus fell in the middle of the street, and in its struggles to get up fell repeatedly until it went over a declivity on the lower side of the street, taking the omnibus and the plaintiff with it. There was no railing along the declivity. *Held*, the jury having found that the *fall* of the horse was not due to the negligence of the city, that plaintiff could not recover, such *fall* being the proximate cause of the injury. The court says in its opinion:

> "The learned judge stated the general rule to the jury correctly, but he seemed to be of opinion that the neglect of the city to erect a barrier and the failure and struggles of the horse, might be regarded as concurring causes of the accident, and the city might be required to pay for its results on that theory. This was a mistake. If two distinct causes are operating at the same time to produce a given result which might be produced by either, they are 'concurrent' causes, they run together, as the word signifies to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate and the other the remote cause. When they stand in this relation to each other the result to be considered the law regards the proximate as the efficient and responsible cause and disregards the remote."
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> "To determine the relation which the failure of the horse in the case bears to the negligence of the city, must remember that the jury has found that they bear no relation to each other; that the failure of the horse was not chargeable to the negligence of the city. It was therefore, an independent, unrelated cause, without which the accident would not have happened. It was the first or proximate cause in the series; the efficient and responsible cause.
>
> "The absence of the barrier was the remote cause. It did not bring about or help to bring about the accident, although it made its consequences more serious."

In Loftus *vs.* Dehail, 133 Cal., 214, the plaintiff was injured by being pushed into an unguarded cellar by her four-year-old brother. She sued the owner of the premises, alleging negligence in the failure to guard the same, but it was held that she could not recover, since the act of the child in pushing her was the proximate cause of her injury, and not the owner's negligence in failing to guard or fence the cellar.

In the case of Glassey *vs.* Worcester Consolidated Street Railway Company, 185 Mass., 315, the above railway company left a reel of wire lying on its side in a portion of the highway. Some boys rolled it down the street, striking plaintiff's carriage and injuring her. The negligence of the company in leaving the reel in the highway was considered too remote to entitle plaintiff to recover. The court says:

> "But assuming that the reel was left in the highway, and that there was some evidence of negligence, we think that such negligence was the remote and not the direct and proximate cause of the plaintiff's injury. * * * It seems to us that, conceding that there was evidence of negligence on the part of the defendant in leaving the reel where its servants did, they could not be required to anticipate that this would happen in the ordinary course of events and therefore that the negligence was too remote."

In Hoge *vs.* Lake Shore, etc., R. R. Co., 85 Pa. State, 293, the facts were: That plaintiff owned an oil lease in Oil City, near the track of the defendant. The railroad of the defendant runs along the right bank of Oil Creek, at the base of a high and precipitous hill. During a rain storm a slide of earth and rocks came down the side of the hill and lodged upon defendant's track. A short time after this slide-fall, a train consisting of seventeen cars of crude petroleum ran into the slide. The engineer was not upon the lookout. The train was thrown from the track, the oil cars bursting, the petroleum ignited by the fire from the engine and the oil thus ignited ran into the creek and was carried down the

stream some three or four hundred feet and set fire to the buildings of the plaintiff, which were totally destroyed. The court said:

> "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrong-doer as *likely* to flow from his act. * * * It would be unreasonable to hold that the engineer of the train could have anticipated the burning of plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land slide.
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> "The probable consequence of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks; the oil taking fire, the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's buildings?
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> * * * * * * *
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> "It is manifest that the negligence was the remote and not the proximate cause of the injury to plaintiff's buildings."

In Board of Trade Corporation *vs.* Cralle (Va.), 22 L. R. A., N. S., 297, the facts were very similar to the case of Cole *vs.* Savings & Loan Society, *supra*. Defendant corporation had a contract with its tenants to operate a sufficient number of elevators to maintain prompt service in its building, but failed to do so, and left an elevator open and unattended, and plaintiff being invited into the same by a hall boy, who was not an elevator operator, was injured in consequence of the negligence of the boy in operating the car. A judgment in plaintiff's favor against the defendant was reversed by the Virginia Supreme Court of Appeals, which held that the defendant's negligence in leaving the car open and un-

guarded and in failing to abide by its contract to give proper service were not the proximate causes of these injuries. The court said:

> "Conceding, for the purposes of this case, that the conditions which existed at that time were not merely a breach of the contract between the defendant and the Board of Trade, by which the former had agreed to keep in operation a sufficient number of elevators, not exceeding two, to maintain prompt service, but were actionable negligence, was that negligence the proximate cause of the injury?
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> "In the case of Connell *vs.* Chesapeake & O. R. Co. (Ball *vs.* Chesapeake & O. R. Co.), 93 Va., 44, 59-60; 32 L. R. A., 792; 57 Am. St. Rep., 876; 24 S. E., 467, it was held, quoting the language of Justice Miller in Scheffer *vs.* Washington City, V. M. & G. S. R. Co., 105 U. S., 249; 26 L. Ed., 1070, that, 'to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' Winfree *vs.* Jones, 104 Va., 39, 44; 1 L. R. A. (N. S.), 201; 51 S. E., 153, and cases cited.
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> "It was said in the last cited case that 'a natural consequence is one which has followed from the original act complained of in the usual, ordinary and experienced course of events. A result, therefore, which might reasonably have been anticipated or expected.
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> "In Fowlkes *vs.* Southern R. R. Co., 96 Va., 742; 32 S. E., 464, it was said: 'It is not only requisite that damage, actual or inferential, should be suffered but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law, the immediate and not the remote, cause of any event, is regarded. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate

> consequence, the law will refer the damage to the last, or proximate, cause, and refuse to trace it to that which was more remote.' "

In Mahany Township *vs.* Watson, 116 Pa., 344, a pair of horses driven to a sleigh struck an ash heap negligently left by the township in the road and the sleigh was overturned. The horses thereby became frightened, ran off the road and upon a railroad track, where they were overtaken by a train and killed. It was held that the negligence of the township was not the proximate cause. The court said in part:

> "In determining what is proximity of cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen, by the wrong-doer as likely to flow from his act. Measured again by this rule, and the plaintiff's case fails; for whilst the supervisors might have foreseen the upset of the ash heap, it was not possible for them to anticipate the ultimate result of the accident as it finally happened."

In Texas Pacific Railway Company *vs.* Beckworth (Texas Civ. App.), 32 S. W., 347, it is said:

> "When a defendant has violated a duty imposed upon him by common law, he should be held liable to every person injured whose injury is the natural and probable consequence of the misconduct, and the liability extends to such injuries as might reasonably have been anticipated, under ordinary circumstances, as the natural and probable result of the wrongful act. (Citation.) It is upon the question of what consequences are the natural and probable result of the wrongful act, or might have been anticipated as such, that the decisions diverge, and, in some cases, become irreconcilable with each other. It is generally held, however, that if, subsequent to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfor-

> tune, the former must be considered as too remote. (Citation.) This has been recognized as the correct rule in our own State. (Citation.)"

In Schaeffer *vs.* Township of Jackson (Pa.), 24 Atl., 629, the facts of the case are as follows:

Where a hole in the road, and a pile of stones placed on a highway by the town supervisors, rendered the road at that place unsuitable and insufficient for ordinary public traffic, the township is guilty of negligence.

Plaintiff had been driven safely past such place when the horse became frightened by a donkey, turned short round, breaking a wheel of the buggy, and ran back, one axle dragging on the ground. The dragging axle caused the buggy to be drawn to the side of the road, where it caught in the hole. The buggy was upset and plaintiff injured. *Held*, that the township was not liable, the occurrence being extraordinary, and not the natural and probable result of the negligence, but of an independent, primary, efficient, proximate cause.

In the opinion the court says:

> "But the cases must be rare in which an injury can be said to be the result of the negligence of a party when there is another and primary, efficient, proximate cause, wholly independent of such negligence and for which the party charged with negligence is in no way responsible. In such cases it would be incumbent on the plaintiff to show that the accident would have happened without the concurrence of the primary, efficient, proximate cause."

In the case of Galveston, etc., R. R. Co. *vs.* Chambers, 73 Texas, 296, the facts are as follows:

In an action against a railway company to recover for the death of a child caused by the alleged negligence of defendant the evidence showed that the deceased was walking on the railroad track from school, when she stepped aside for a train until it had passed. The train had separated

from some cause, and the rear car of the part attached to the locomotive was some fifty yards in advance of the foremost car in the part of the train following. After the first part of the train had passed, the child went upon the track and was run over by the cars following. It appears that as soon as the separation was seen defendant's employees at once applied the brakes to stop the detached part of the train. *Held*, that the court erred in finding that the uncoupling of the train was the direct cause of the accident and in holding defendant liable therefor.

In the opinion the court says:

> "If, then, it be conceded that the train separated from the failure of appellant or its servants to use proper care, can it be said, as the court found, 'that the uncoupling of the train was the direct cause of the death of the child'? 'It cannot be said that the injury was the natural or probable result of the working of train that ought to have been foreseen; and, but for the intervention of an independent cause brought into being by the exercise of a will in no way under the control of appellant or its servants, the accident never would have occurred.'"

In Nelson *vs.* Lighting Company (R. I.), 67 L. R. A., 116, the plaintiff was injured by the falling of an electric-light globe which was alleged to have been negligently placed and maintained in close proximity to an overhead trolley wire. The glass globe was broken by a trolley pole, which slipped from the wire as it was going around a curve, struck the globe, and caused it to fall upon the plaintiff, who was passing along the street. A demurrer was filed by the defendant and was sustained by the Supreme Court of Rhode Island upon the ground that the negligence of the defendant in placing and maintaining the lamp in question so near to the trolley wire that it was apt to be struck in case the pole slipped from the wire was not the proximate cause of plaintiff's injury, but that it formed only the conditions under which the accident happened. That the placing and main-

taining of the globe in the position in which it was at the time of the accident were in themselves harmless acts and would not have resulted in the accident except for the intervention of the act of the trolley pole in slipping from the wire and striking the globe, and therefore the slipping of the trolley wire was the proximate cause of the accident.

In Railroad Company *vs.* Trich, 117 Pa. St., 390; 2 Am. St. Rep., 672, the facts appearing sufficiently in the extract from the opinion, the court says:

> "In determining what is proximate cause, the true rule is, that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.
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> "Applying this rule to the facts of the present case, can it be said that the injury of Mrs. Trich was the natural and probable consequence of the car driver's negligence in urging his horses to a faster gait? We think not. There was not a particle of evidence to show that runaway horses and vehicles were frequently, or indeed ever, seen upon Smithfield street where this accident occurred. There was no evidence upon that subject. It was certainly not a natural consequence of a person being upon that street that he would be struck by a runaway horse. Nor is there the slightest reason for saying that it would be a probable consequence. *The utmost that can be said would be, that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen, and which for that reason should be foreseen.* Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may

occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. We are of opinion that, in the facts of the present case, the direct and immediately producing cause of Mrs. Trich's injury was her being struck by a runaway horse and buggy, over which the defendant company had no sort of control, and for which it is not responsible; and therefore we conclude that the proximate cause of the injury, in the legal sense, was the collision of the horse and buggy with the person of Mrs. Trich, and not the negligence of the defendant."

In the case af Atchison, Topeka & Santa Fe R. R. Co. *vs.* Dickens, 103 S. W., 750, the facts appearing in the opinion, the court says, in part:

"Injury that could not have been foreseen or reasonably anticipated as a probable consequence, and that probably would not have resulted from it had not the interposition of some new and independent cause interrupted the natural sequence of events and turned aside their course and produced it, is not actionable.

"There is no question but that the act of Cooper was negligence in a high degree, and, if the company were also negligent, his act was the intervening cause of the injury. But he being an employee of an independent contractor, before the company can be held liable, it must not only appear that it was guilty of an act of negligence, but that act must have been so connected with the injury and the intervening act of Cooper as to constitute a proximate cause of the injury, and it must have been an act which, when done, would naturally and probably result in the injury, and this result must have been so apparent at the time that the engineer could reasonably foresee it. It must be established that there was a causal connection between the act of negligence of the company and the injury, and that this causal connection had not been broken by the interposition of some independent force that took advantage of the situation to accomplish something

not the probable or natural effect of the situation as it existed. In the case of Ins. Co. *vs.* Boon, 95 U. S., 117, the Supreme Court of the United States say: 'The proximate cause is the efficient cause—the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones.' In Railway Company *vs.* Kellogg, 94 U. S., 469, the same court say: 'The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?' In the case of Goodlander Mill Co. *vs.* Standard Oil Co., 63 Fed., 405, decided by the Circuit Court of Appeals for the Seventh Circuit, the court, in laying down the rule and quoting from both the above cases, say: 'The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was, doubtless, in a sense, a cause of the injury—an antecedent cause. But, where the negligent act is not wanton or *malum in se*, the law stops at the immediate, and does not reach back to the antecedent, cause. The causal connection between the negligence and the hurt is interrupted by the interposition of an independent human agency and, as Mr. Wharton expresses the thought, the intervenor acts as a non-conductor and insulates the negligence.' The test is: Was the intervening efficient cause a new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the chain of causation, although it may have remotely contributed to the injury as an occasion or condition? Here the gas company gave the negligent act a mischievous direction. If but for such interposition the defendant's negligence would have produced no injury, the causal connection is broken, because the intervening act made the act of negligence, otherwise innocuous, operative to

injury. The injury must be the natural and probable consequence of the negligent act, and such as ought to have been foreseen in the light of attending circumstances. * * * The negligent omission of the valve did not necessarily set the other causes in operation. It was in the language of the Boon case, above referred to, the incidental cause, or the instrument of a superior and controlling agency, and was thereafter not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion?'

"Applying this rule to the facts of this case, and conceding for this purpose that the act of leaving the engine unguarded was a negligent one, was it the proximate cause of the injury? Was the act of Cooper the 'natural and probable' consequence of the act of the engineer, and so palpable to him that he would have reasonable grounds to believe it would occur? Or, would the injury have occurred if the causal connection between the wrong of the company and the injury had not been broken by the intervening negligent act of Cooper As the engine stood, to be supplied with fuel, the steam shut off, and in good condition, it was harmless; and before it could possibly become an instrument of danger some independent, intervening cause must have thrown the lever and put on the steam. There were no children nor young and inexperienced persons around to be lured to the standing engine, and this case must not be confounded with that class of cases. If it became necessary to move the engine, the proof shows that experienced hostlers, whose duty was to handle engines in the yards, were within easy call. The company had provided them for that purpose, and they were there. The engine was not on the main track, so as to be in danger of collision with moving trains. Under these circumstances, when the hostler left his engine, was it probable to him

that an inexperienced, unauthorized and forbidden coal shoveler would mount the engine and attempt to move it? It was possible, but was it probable? It seems to us that the probabilities were all the other way, and that he could have had no reason to believe that such a thing would be done, and could not 'reasonably have foreseen it.' And this seems to have been the conclusion of the court that tried the case below. In the charge the court says: 'You are instructed that it was the duty of the defendant to furnish a reasonably safe place for the deceased, Henry Dickens, to work, but that the defendant was not bound to foresee that such place would be rendered unsafe by an act of negligence of a fellow-servant or stranger. If you are satisfied from the evidence that the said Cooper did move said engine against the engine under which deceased was engaged, such act could not have been reasonably anticipated or foreseen by the defendant; said Cooper not being in the employ of defendant, or intrusted with the care of handling of engines.' It seems to us that the court should have stopped here, and directed a verdict for defendant, instead of submitting to the jury the question as to whether under the circumstances the hostler could have reasonably foreseen and anticipated that the injury would follow from his act. This instruction was equivalent to a charge to return a verdict for the defendant, and we think that under the proof the court should have permitted it to stand as a peremptory instruction in its favor."

In McClain *vs.* Town of Garden Grove, 83 Iowa, 254; 12 L. R. A., 482, a horse attached to a sleigh fell from some unknown cause, presumably by reason of disease or choking of the harness, while crossing a bridge, and the occupants of the sleigh were precipitated to the ground below and injured. Plaintiff sued the township, alleging negligence in maintaining a bridge of insufficient width and in not providing it with sufficient railings. *It was held that the falling of the horse and not the narrowness of the bridge or the insufficiency of the railing was the proximate cause*

of plaintiff's injury and a directed verdict in favor of the defendant was sustained. The court said in part:

> "To entitle plaintiff to recover it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge. West *vs.* Ward, 77 Iowa, 325, and cases therein cited.
>
> "Under the evidence submitted we do not think that is a matter about which there can be any controversy. The horse which Miller was driving fell because it was diseased, or not properly harnessed and driven. The width of the bridge and the condition of the railing had nothing to do with its fall and death. Had it not fallen the accident would not have occurred. The railing of the bridge was about two and a half feet high, and it may be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided. But defendant was not an insurer against accidents. 2 Dillon, Mun. Corp., par. 789; Raymond *vs.* Lowell, 6 Cush., 524. It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended."

In Hunter *vs.* Wanamaker (Pa.), 2 Cen. Rep., 70, it was held that where one walking on the street slipped on account of ice and, falling, struck her head on a projecting cellar door, the negligence in maintaining such door was not the cause of her injury.

Where a person traveling by night, driven by a drunken driver, is precipitated down an unfenced bank, the drunkenness of the driver and not the defective condition of the road is the proximate cause of the injury.

Hershey *vs.* Mill Creek Township (Pa.), 8 Cent. Rep., 252.

In McGahan *vs.* Indianapolis Gas Co. (Ind.), 37 N. E., 601, defendant neglected to turn off gas supply in tenement, in which there was a defective pipe, after being instructed so to do. Plaintiff, a plumber, while searching for the defect, was injured from an explosion of the gas ignited from a lamp which he was carrying to furnish light so he could find the defect. The court held that independently of the question of contributory negligence the defendant was not liable, as plaintiff's own act was an independent intervening cause.

The court said in part:

> "The omission was an antecedent to the explosion. If the omitted facts should disclose an agency for which the appellee was responsible a different case would be made; and if such facts should disclose that the appellant sought the defect in the pipe carrying a lighted lamp, which caused the explosion, the question would then arise as to whether his own act so operating did not insulate the negligence of appellee from injury. * * * *The intervening agency was appellant's own act in carrying a lighted lamp which caused the explosion.* Leaving out of view the doctrine of contributory negligence, the skill of the appellant in business of plumbing, and his acquaintance, necessarily, with the explosive character of natural gas, gives emphasis to his responsibility for the explosion."

In Russe *vs.* Morris Bldg. & Land Asso., 104 La., 438; 29 So., 46, the court held that the contention that the fact that the gate which closed the way for the entrance and exit of passengers to a passenger elevator was attached to the wall outside the elevator and *not to the elevator itself*, thereby leaving an open space between the elevator and wall sufficient to admit an arm or leg, was a constant menace to the safety of passengers, cannot be sustained, where the elevator had been successfully operated in that condition during a series of years, without other accidents than the one for which action is brought, notwithstanding three or four

thousand passengers had been daily carried up and down thereon.

In O'Connor *vs.* Brucker (Ga.), 43 S. E., 731, the opinion is by Mr. Justice Lamar, and he says in part as follows:

> "But even if leaving the door open was an act of negligence and an enticement to children, the owner would only be liable for damages which naturally flowed from such act—as, for example, for injuries caused by a child falling through a hole in the floor, or from defects in the building. But where there was no defect in the building, where the windows were down, and where a companion attempted to lift the window sash, and in so doing the window fell and injured the hand of the infant, the owner of the building is not responsible. If the gate to the yard had been left open, and children had entered, and while at play one had accidentally dropped a brick or heavy object on a playmate, the land-owner would not be responsible. The principle is not different where the injury occurred within the building. It was not negligence to let window sash remain unfastened. *The fall of the window was not the proximate result of leaving open the door. The injury was caused by the independent and intervening act of the infant's playmate.*"

In Beall *vs.* Township of Athens, 81 Mich., 536, the facts are not involved and appear sufficiently from the quotation of the opinion which follows. The court said, in part:

> "The immediate question in this case is whether the narrowness of the highway and the neglect to place railings or barriers along it primarily caused the accident. The township is only liable where the neglect complained of was the proximate cause of the injury. If such neglect was a secondary or remote cause, the township is not liable. The testimony shows conclusively, and without contradiction, that the primary cause of the accident arose from the horse taking fright at a log at the side of the road, and the act of the driver in striking the horse with a blow of his whip. The court correctly charged that a log being in the way was not such a defect as would render the

township liable. * * * An injury caused by negligence, and an accident not being prevented by negligence, are very distinct in operation and effect. * * * If a township can be charged with liability for injuries caused by its negligence, and also for accidents its negligence has not prevented, it comes very near to being an insurer for the safety of travelers passing through its highways."

The case of Lewis *vs.* Flint & P. M. Ry. Co. (Mich.), 19 N. W. Rep., 744, was as follows:

Plaintiff, in the night, took passage, on the caboose attached to a freight train on defendant's road, to be carried to a flag station where he expected to get off and walk by the highway for some distance into the country. The night was dark and the station-house was not kept open in the night and was not lighted. The train passed the station a little before stopping. When plaintiff got off he could not see the station-house, and the conductor told him he was about two car lengths beyond it. The plaintiff said if that was all it made no difference, as he had to go that way to the highway. He started along the track towards the highway, as he supposed, and, if he was where he supposed he was, he would have to cross a cattle guard to reach it. He had crossed this cattle guard before and sometimes found timber or plank over it. He soon discovered, however, that he had been left beyond the highway, and he turned about to go back to it. To reach it he would be obliged to cross the cattle guard on that side. He knew this and was proceeding cautiously, intending when he reached the cattle guard to step down into it, and out on the other side, unless he should find timber or plank laid across it. Coming to the brink of it, he saw indistinctly what he took to be the cattle guard some paces off, and, stepping forward, his foot slipped and he fell into it and was seriously injured. For this injury he brought suit, counting upon the negligence of defendant in carrying him past the station and in misinforming him as to where he was. *Held,* that the negligence of

defendant was not the proximate cause of the injury; it was only the cause of plaintiff being placed where, through another occurrence happening unexpectedly and without fault, an injury befell him.

In the case of Claypool *vs.* Wignore (Mass.), 71 N. E. Rep., 509, the facts, which are very similar to Cole *vs.* German Savings & Loan Ass'n and Board of Trade *vs.* Cralle, *supra*, are as follows:

Plaintiff was injured by falling down an elevator shaft in a public building. Had she looked carefully before stepping into the shaft, she could have seen that the cage was not there. She had ridden on the elevator before the accident, and knew that the cage was operated by a man standing inside, and had observed that no one but the operator opened the door and let passengers in and out. The door to the shaft was partially open when plaintiff reached it and her companion, not an employee of the owner of the building, opened the door so she could enter and she walked into the shaft without heeding whether the cage was there or not. *Held*, that, even if the owner should be held chargeable with negligence because he allowed the door to the shaft to be left partially open, he was not liable for the injuries sustained, as the negligent act of plaintiff's companion was the act of an independent intervening agent and was the proximate cause of the injury.

In the opinion the court says:

> "We must determine the rights of the respective parties upon the facts specially found, and keep in mind the fact that the building in which appellee was injured was a public place, where she was invited and had a right to be. From the view of the law which we have taken, as applied to the facts found, we do not deem it necessary to discuss or decide the question of appellant's negligence, as a principle of law is involved which absolves him from liability. While the facts in the first instance do not show that appellant's agent or servant left the door of the ele-

vator shaft open a width of eight inches, yet, if it may be conceded that he did, that fact was not the proximate cause of the injury, for it is affirmatively found that, if the door had been left in the condition it was when appellee reached it, she would not have been injured. The direct and proximate cause of her injury was the opening of the door by Wallsmith, with *which act appellant was in nowise connected and for which he was not responsible*. A proximate cause is well defined in the following passage: 'A proximate cause may be defined as that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which that result would not have occurred.'"

In Mo. Pac. R. Co. *vs.* Columbia (Kan.), 58 L. R. A., 399, plaintiff's intestate, who was a locomotive fireman in the employ of the defendant, was killed by the derailment of his engine, the consequence of its running into several heavy grain doors which were upon the track. It was charged that the defendant was negligent in permitting said doors to be piled and remain upon a raised platform of the station near the track. It appeared that they were blown off by the wind and fell upon the track, thus derailing the engine and causing the death of Columbia. The case was submitted to the jury, which found a verdict for the plaintiff, and in addition found specially, in answer to interrogatories, that the piling of the grain doors on the platform in an exposed position was the proximate cause of the accident and not the wind which blew them onto the track, though they also found that if there had been no wind storm on the night in question the accident would not have occurred. Upon appeal it was held by the Supreme Court of the State that the question of what was the proximate cause of this accident was one of law for the court and was not one of fact for the determination of the jury. In deciding that the defendant should have been held not liable as a matter of law,

the court, speaking through Judge Pollock, in an extremely well-considered opinion, said in part:

> "The remaining proposition is one more difficult of solution. The existence or non-existence of negligence in any given case, wherein the facts are disputed, is a question of fact to be determined by the jury. When the facts are undisputed, and only one inference or deduction is to be drawn from them, a question of law is presented for the court. Dewald *vs.* Kansas City, Ft. S. & G. R. Co., 44 Kan., 586; 24 Pac., 1101. However, it is not every act of negligence that furnishes a basis for recovery of damages sustained. In the case of Cleghorn *vs.* Thompson, 62 Kan., 727; 54 L. R. A., 402; 64 Pac., 605, this court held: 'Negligence to be actionable, must result in damage to some one, which result, in the absence of wantonness or *malus animus*, might have been reasonably foreseen by a man of ordinary intelligence and prudence, and be the probable result of the initial act. * * * An allegation of negligence is not sustained by evidence of acts resulting in damage to another, which result is not the reasonable and ordinary outcome of such acts, and which would not have been foreseen * * * under all the circumstances of the case.' In the opinion, quoting from Allegheny *vs.* Zimmerman, 95 Pa., 287; 40 Am. Rep., 649, it is said: 'One is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may, therefore, have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature.' 'Negligence is not the proximate cause of an accident, unless, under the circumstances, the accident was a probable, as well as a natural consequence thereof—one which might reasonably have been foreseen by a man of ordinary intelligence and prudence.' Huber *vs.* La Crosse City R. Co., 92 Wis., 636; 31 L. R. A., 583; 66 N. W., 708. 'It is not enough that a defendant has been negligent unless that negligence has contributed to the injury of the plaintiff.' Sowles *vs.* Moore, 65 Vt., 322; 21 L. R. A., 723; 26 Atl., 629. While one is responsible for such consequences

of his fault as are natural and probable, and might, therefore, be foreseen by ordinary forecast, if his fault happened to concur with something extraordinary, and therefore not likely to be foreseen he will not be answerable for the extraordinary result. Schaeffer *vs.* Jackson Twp., 150 Pa., 145; 18 L. R. A., 100; 24 Atl., 629; Milwaukee & St. P. R. Co. *vs.* Kellogg, 94 U. S., 469; 24 L. Ed., 256; Hubbell *vs.* Yonkers, 104 N. Y., 434; 59 Am. Rep., 522; 10 N. E., 858; Washington *vs.* Baltimore & O. R. Co., 17 W. Va., 190; Block *vs.* Milwaukee Street R. Co., 89 Wis., 371; 27 L. R. A., 365; 61 N. W., 1101; Farmers' High Line Canal & R. Co. *vs.* Westlake, 23 Colo., 26; 46 Pac., 134; Lewis *vs.* Flint & P. M. P. Co., 54 Mich., 55; 52 Am. Rep., 790; 19 N. W., 744; Daniels *vs.* Ballantine, 23 Ohio St., 532; 13 Am. Rep., 264; Henry *vs.* St. Louis, K. C. N. R. Co., 76 Mo., 288; 43 Am. Rep., 762. In cases of this character, where two distinct, successive causes, unrelated in operation to some extent contribute to an injury, it is settled where there is an intervening and direct cause, a prior and remote cause cannot be made the basis for recovery of damages, *if such prior cause did no more than furnish the condition or give rise to the occasion by which the injury was made possible.* And it seems to be sound in principle, and well settled by authority where it is admitted or found that two distinct successive causes, unrelated in their operation, conjoin to produce a given injury, one of them must be the proximate, and the other the remote cause of the injury, and the court, in passing upon the facts as found or admitted to exist, must regard the proximate as the efficient and consequent cause, and disregard the remote cause. In South Side Ass. R. Co. *vs.* Trich, 117 Pa., 390; 11 Atl., 627, it is held: 'When, in an action for negligence, the fact is undisputed in the evidence that the injury received was inflicted by an intervening agency over which the defendant had no control, the question of remote or proximate cause must be determined by the court, and the jury instructed accordingly.' In Herr *vs.* Lebanon, 149 Pa., 222; 16 L. R. A., 106; 24 Atl., 207, it is held: 'If two distinct causes are successive and unrelated in their operation, one of them must be the proximate

and the other the remote, cause. In such case the law regards the proximate as the efficient and responsible cause, and disregards the remote.' In Goodlander Mill Co. vs. Standard Oil Co., 27 L. R. A., 583; 11 C. C. A., 253; 24 U. S. App., 63 Fed., 400, it is said: 'The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.' Bleil *vs.* Detroit Street R. Co., 98 Mich., 228; 57 N. W., 117; Aetna F. Ins. Co. *vs.* Boon, 95 U. S., 117; 24 L. Ed., 395. Applying these principles to the case at bar what conclusion must be reached therefrom? We find the grain doors in question piled 15 to 22 feet from the track. They weighed seventy to one hundred pounds each. They were $5\frac{1}{2}$ by $6\frac{1}{2}$ feet in dimension. With batten nailed across ends, they were two inches in thickness. There were 11 to 15 of them, thus making a pile of the height of 22 to 30 inches. They were piled against the depot building. In this place and manner the same kind of doors had been placed from ten to fourteen years prior to the injury, and no accident transpired therefrom. That the placing of these doors in the position in which they were placed, furnished the occasion or condition which rendered the accident possible is not to be disputed, and cannot be denied. That is to say, if these grain doors had not been there on the depot platform, the accident which did happen would not have happened; the injury would not have occurred. But can it be reasonably and successfully maintained that the employees of the company, in the exercise of that reasonable care and precaution required for the safety of those operating the engines of the company to keep the track free of obstructions, should have foreseen, anticipated or even imagined that from the operation of any ordinary, natural cause these doors, or one or more of them, might be lifted and carried from the place where located, and lodged upon the track in such manner as to obstruct and render dangerous the operation of the road, or as to cause the derailment of an engine? We think not. On the night in question a severe gale blew. A gale is defined as a wind

having a velocity of 40 to 70 miles an hour. Standard Dict. Webster defines a heavy gale as a wind having a velocity of 80 miles an hour. The jury find, and must of necessity have found, under the evidence, the accident would not have occurred in the absence of this severe gale. In Milwaukee & St. P. R. Co. *vs.* Kellogg, 94 U. S., 469; 24 L. Ed., 256, Mr. Justice Strong, in delivering the opinion of the court says: 'But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate, efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.' * * * Measured by authority, determined upon principle, or viewed in the light of the instructions of the court to the jury, which of the two distinct, successive causes operating independently of each other to produce the injury,—that is, the place and manner of piling and keeping the grain doors, or the severe gale—must be held to have been the consequent, efficient and proximate cause of this injury? *Manifestly, it must be said the place and manner of piling and keeping the doors did no more than furnish the condition, afford the opportunity, for the accident which occurred.* The operation of the successive, wholly independent and unrelated cause and intervening agency, the severe gale, was the consequent, efficient, and proximate cause of the grain doors being

upon the track, which resulted in the derailment of the engine and damage to the plaintiff.

"It follows, under the charge of the court to the jury, and the findings of fact as made by the jury, the general verdict should have been in favor of the defendant. The jury failing in this, the trial court should have sustained the motion for judgment upon the findings made, notwithstanding the general verdict."

To the same effect are:

Reeves *vs.* Wallace, 10 Wall., 176.
Morrison *vs.* Davis, 20 Penn. St., 293.
Cuff, adm't'r, *vs.* N. & N. Y. R. Co., 35 N. J. L., 18.
Smith *vs.* Kanawha County (West Va.), 8 L. R. A., 82.
Moulton *vs.* Sanford, 52 Me., 127.
Brown *vs.* Wabash, 20 Mo. App., 222.
Cornell's Ex'rs *vs.* Chesapeake & Ohio Ry. Co. (Va.), 24 S. E., 467.
Fowlks *vs.* Southern Ry. Co. (Va.), 32 S. E., 464.
Winfree *vs.* Jones (Va.), 51 S. E., 153; 1 L. R. A. (N. S.), 201.

No Negligence.

Under the authorities the general proposition is established that in order to recover plaintiff must show some negligent act on the part of the defendant and, also, that the accident and injury complained of were not only the natural and probable consequence of such act claimed to be negligent, but, also, that the accident and injury were, in fact, occasioned by such act, and, in addition, that the accident and injury so suffered should have been foreseen and anticipated, and therefore guarded against, by a man of ordinary care and prudence.

So far as these propositions are concerned the only real conflict in the authorities, which is more fanciful than substantial, relates to the doctrine of "foreseeableness."

Under some of the authorities the accident and injury must have been such as should have been foreseen in order that the negligent act complained of may be held to be the proximate cause thereof, while, according to others, the question whether it should have been foreseen and guarded against has nothing to do with the doctrine of proximate cause, but relates purely to the character of the act—whether it is to be considered negligent or not. Under these authorities, of which New York is a notable example, a party is not negligent in failing to guard against that which he should not have been expected to foresee, and he consequently escapes liability because the act itself is held to be not negligent, though these courts also limit the doctrine of proximate cause to such things as are the natural and probable consequences of the act complained of.

It is, of course, immaterial, in so far as the result is concerned, which one of the avenues of approach to this perplexing subject is adopted; for, tested by any one or all of the rules, the result is the same.

The case of McGrell *vs.* Buffalo Office Building Co., 153 N. Y., 265, involves a state of facts so similar to that of the case at bar that the opinion in this case is of much more than usual value. The defendant was the owner and operator of a passenger elevator in an office building, the shaft of which was enclosed by bars forming a grating, with doors in the shaft but none in the car. Plaintiff's intestate, a girl of nine and a half years old, while a passenger upon the car sprang forward and was caught between the shaft bars and the floor of the car and fatally injured. The negligence charged against defendant was that the elevator was so unskillfully operated as to cause a violent jolt which threw her against the bars of the shaft or well of the elevator, the defendant's omission to provide any door to the car or to properly guard the opening through which persons entered it, and that the bars used in the construction of the shaft were

insufficient. It was held that these acts or omissions did not constitute actionable negligence.

The court, in its opinion, said:

> "While it was defendant's duty to provide a safe and suitable car, appliances and other machinery for the operation of its elevator, and for the accommodation of its passengers, and to exercise strict diligence in that respect, still, the law did not impose upon the defendant the duty of providing for their absolute safety, so that they should encounter no possible danger, and meet with no casualty in the use of the appliances provided. Dougan *vs.* Champlain Transportation Co., 56 N. Y., 1; Crocheron *vs.* N. S., etc. Co., 56 N. Y., 656; Cleveland *vs.* N. . Steamboat Company, 68 N. Y., 306; Loftus *vs.* Union Ferry Co., 84 N. Y., 455; Laflin *vs.* Buffalo, etc., R. R. Co., 106 N. Y., 136; Morris *vs.* N. Y. Cen., etc., R. R. Co., 106 N. Y., 678; Frobisher *vs.* 5th Ave. Transportation Co., 151 N. Y., 431. In the Dougan case, an omission to enclose the space between the railing and deck of a boat so as to preclude the possibility of slipping under it, was the negligence charged. It was shown that many of the boats in use were constructed in that way and no accident of a similiar kind had happened and the court held that this fact was proof that there was no reasonable ground to apprehend that any one would fall under the railing, and, therefore, the negligence could not be predicated upon the failure to board up the space. The Crocheron case was where the plaintiff slipped on the edge of a step as she was passing down the stairway to leave the defendant's boat. The negligence alleged was the placing of a plate on the stair. It was proved that the stairs upon the best boats were finished in that manner, and that the boat had been in use a year and carried many thousands of passengers and no injury of the kind had occurred before. It was held that there was no evidence of negligence and a non-suit should have been granted. In the Cleveland case, a somewhat similar accident occurred, and it was there said: 'The defendant is liable for any injury which might reasonably be anticipated to occur in view of

all of the circumstances, and of the nature of the carriage, and the number and character of the persons upon the boat. (Citation.) This broad statement has limits. *The carrier of passengers is not bound to foresee and provide against casualties never before known and unreasonable to be expected.* Dougan *vs.* Champlain Trans. Co., 56 N. Y., 1; see also, Wyckoff *vs.* Queens County Ferry Co., 52 N. Y., 32; Crocheron *vs.* N. S., etc., Co., 56 N. Y., 656. Hence his duty is not to be estimated by what after the accident, then first appears to be a proper precaution against the recurrence of it.'

"Loftus against Ferry Company was a case where a child fell through one of the openings in the guard on the side of the bridge or float adjoining the passageway for the passengers leaving the boat of the defendant, and it was said that the fact that it had been long in use without accident, justified the conclusion that the company had no reason to apprehend such an accident, and therefore the plaintiff could not recover. In Laflin case, where the negligence claimed was that the platform was too far from the steps of the cars, and by reason thereof, the plaintiff fell between them, and was injured, it was decided that the proof did not justify recovery by the plaintiff. In that case there was proof that no accident had happened at that station before, although it had been in use for years, and the court said: 'It was not bound so to construct its platform as to make accidents to passengers using the same impossible. * * * It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate to purposes to which it was devoted. * * * No structure is ever so made that it may not be made safer. But as a general rule, when the appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.' In the Morris case where a passenger was injured by the falling of a clothes-wringer which was placed in one of the racks above the seat occu-

pied by him, this court decided that the defendant was not liable, as it was bound only to exercise reasonable care to prevent such an accident. The Frobisher case was where the plaintiff was injured in attempting to enter an omnibus. While standing upon the step his foot slipped under the body of the vehicle, he fell, and his injury was the result. The alleged negligence was that the back of the step was open. There was proof that the kind of step used by the defendant was in general use, and this court held that it was not chargeable with negligence in the use of such a step, as it did not appear that any accident of that character had occurred before. If the principle of these authorities is applicable to this case, then it is plain that plaintiff cannot recover unless such an injury as was sustained by plaintiff's intestate could have been reasonably anticipated, and, in view of all the circumstances, might, with reasonable diligence, have been foreseen and provided against.

"It is said that the foregoing authorities have no application to this case, but that the defendant was bound to exercise the utmost care and diligence, and was liable for the slightest neglect against which human prudence and foresight might have guarded. It may be that, as to the machinery and appliances by which an elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and that he is in that respect subject to the same rule that applies to a railroad company in regard to its road-bed, engine and other similar machinery. But, as to surroundings and other structures forming a part of the elevator plant, where less danger is to be apprehended we think the rule is less strict, and the doctrine of the cases cited applies. In the latter case, the rule is specified as that degree of care which a reasonably prudent man would exercise. This distinction is considered in some of the cases to which we have already referred. The requirement of the greater degree of care is dependent, not so much upon the actual apprehension of danger, as upon the consequences likely to result from a defect in the machinery and

appliances. In cases where less serious results are to be expected, and in cases where danger is not to be apprehended, if due and proper care is observed by the passenger, the owner is responsible only for the want of ordinary and reasonable care. Kelly *vs.* Manhattan Rwy. Co., 112 N. Y., 443; Miller *vs.* O. S. S. Co., 118 N. Y., 199, 211. In this case no such serious results were to be expected. There was no defect or insufficiency of the bars or grating, and, besides, with the exercise of due and proper care, on the part of a passenger riding in this elevator, no danger of such an accident could have been apprehended, and no such injury would have occurred. Hence the defendant is responsible only for the want of ordinary and reasonable care. We find no testimony that would justify finding that the decedent's injury resulted from starting the elevator with a jerk or jolt. The evidence is to the contrary, and shows conclusively that the elevator was so constructed that it was impossible that it could have been thus started. Therefore that allegation of the complaint was entirely unproved. Moreover, the record shows that the elevator was in charge of a young man of experience, and in all respects competent. It was of modern construction, properly built and equipped and in good order in every respect. It was also proved that doors to elevator cars were not ordinarily used, that but few had either seats or railings in the car. It was contended that the bars or grating which formed part of the elevator shaft were insufficient in size and were not properly fastened. While this accident may have disclosed this fact, yet the undisputed testimony was that in fireproof buildings of the character of the defendant's that was the customary manner of enclosing elevator shafts. There was also evidence that it was only in cheaper buildings, or those that were not fireproof that brick shafts or wire netting were used, and that the latter would have been no more effective to prevent this accident than the means employed. *No proof that any similar accident had ever occurred before was offered, although such elevators have been in use for years. We think there was no evidence which would have warranted the trial court in submitting to the jury*

the question of the defendant's negligence, in thus protecting the opening of the shaft, as there was nothing to show that the defendant could have anticipated or foreseen any such result from using a grating of that kind, nor do we think that the defendant could be held liable for the reason that there was no door to the car of the elevator, as suggested by the learned judge who wrote the opinion in the court below, though, as we have already seen, the proof was that doors in elevator cars were not in ordinary use, but that doors to openings were used in and formed a part of the shaft and well of the elevator as they did in this case.

"After a careful examination of the evidence, we are unable to discover any proof which would have justified the trial court in submitting the question of the defendant's negligence to the jury. Negligence is not to be presumed but must be proved, and before a plaintiff is entitled to recovery, he must establish an omission to discharge some duty which the defendant owed him. We find nothing in this case to show that the defendant failed to perform any duty which it owed to plaintiff's intestate. The elevator, the guard, and shaft and all machinery employed in the operation were of the usual kind, in complete order, properly operated by a servant, who was in all respects competent.

"Under these circumstances, we think the court properly nonsuited the plaintiff, and that the general term erred in reversing the judgment thereon."

In Dougan *vs.* Champlain Transportation Company, 56 N. Y., 1, the plaintiff's intestate, while a passenger on a boat of the defendant, fell overboard through an unguarded space between the railing and the deck of the boat and was drowned. This unguarded space was a gangway in the forward part of the boat, over which were rails attached by hinges so that they could be moved when necessary for the purpose of receiving and landing passengers and freight. The court held that the plaintiff could not recover, and said in part:

"It will be seen that the only proof of negligence was the omission to enclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury, but the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years; and there was no proof tending to show that any one had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur. * * * The counsel for the appellant cites cases where it has been held that carriers of passengers are required to exercise the utmost care in their vehicles, machinery, etc., used in their transportation, and that for this purpose they are required to use all the safeguards furnished by science generally known; but these were cases of the explosion of steam-boilers; the dragging of axles of railway coaches; defects in railway tracks, and the like, where experience had shown that danger was to be apprehended and necessary to be guarded against. But when, as in the present case, numerous boats, constructed in the same way, had been run for years with perfect safety to passengers, where there was no ground for supposing that any passenger ever permitted to be there would fall under the railing, to find negligence from a failure to board up the space so as to preclude such a possibility, could not be justified."

In Cleveland *vs.* N. J. Steamboat Company, 68 N. Y., 306, the plaintiff fell through a gate across a gangway on a boat of the defendant, which gate was not properly fastened and secured, having been pushed against it by a rush of passengers in that direction. It was held that the accident which occurred could not have been anticipated, and that defendant's failure to secure the gate at the time was therefore not such negligence on its part as would enable the

plaintiff to recover. Judge Folger, speaking for the court, said:

> "It had not been known so to occur before, and we do not think that it can be said that is was reasonable and natural to be looked for as liable to take place then. The case is without a syllable of proof that such an accident ever happened before, or that any one of the constituents of it ever happened before. * * * We see no facts in proof from which it can be said that such an occurrence was reasonably to be anticipated, or that it was or should have been contemplated by the defendant, as in the nature of things likely to occur. It seems to us, that the doctrine of the Dougan case, *supra*, and that of the Crocheron *vs.* N. S. etc., Co., 56 N. Y., 656, was applicable and controlling here, and that the defendant is not chargeable with negligence for not putting in place the rail and stanchions before the starting of the boat. Experience had not shown that danger was to be apprehended from this source, and that it was necessary to be guarded against."

In Loftus *vs.* Ferry Company, 84 N. Y., 455, plaintiff's intestate, a child six years old, fell through an opening in the guard rail of a bridge leading from its boat to the pier. It was held that the plaintiff could not recover, and the court said:

> "The defendant was bound to provide suitable and safe accommodations for the landing of passengers. The rule requiring the strictest diligence in this respect is the only one consistent with a due regard to the value of human life, and with the relation which the defendant assumes to the public. But the rule does not impose upon the defendant the duty of so providing for the safety of passengers, that they shall encounter no possible danger, and meet with no casualty, in the use of the appliances provided by it. It was possible for the defendant so to have constructed the guard, that such an accident as this could not have happened; and this, so far as appears, could have been done without unreasonable expense

or trouble. If the defendant ought to have foreseen that such an accident might happen, or if such an accident could reasonably have been anticipated, the omission to provide against it would be actionable negligence, but the facts rebut any inference of negligence on this ground. The defendant had the experience of years, certifying to the sufficiency of the guard. That it was possible for a child or even a man to get through the opening was apparent enough, but that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurence of such a casualty. If the structure was intrinsically insecure, the fact that it had been used without injury before this would not exempt the company from responsibility, when an accident did happen from its defective condition. The guard was conceded to be sufficient for grown people, and a small child might more easily get through the opening than a man, but small children are usually in charge of parents or guardians; and this is entitled to some weight in determining the question of the company's negligence. We think the exemption of the defendant in this case rests upon the fact which we think clearly appears, as an inference from the other facts that the company had no reason to apprehend an accident like this, and that the arrangements made were such as experience had, up to that time, shown to be safe and suitable, and sufficient to meet the requirements of its duty. The line which separates a pure misadventure resulting in injury, for which no one is responsible, from accidents, creating responsibility, by reason of negligence, is often narrow and difficult to be drawn; but we think the casualty in this case is of the former and not of the latter class. It results from these views that the defendant was not liable and that the verdict was properly set aside."

In Lafflin *vs.* Buffalo & S. W. R. Co., 106 N. Y., 136, the plaintiff fell while stepping from defendant's car to its station platform and was injured. The negligence alleged was in placing the platform at too great a distance from the

steps of the car. It was held that she showed no breach of duty on the part of the defendant, the court saying:

"There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was not greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary, the evidence shows that the platform had been used for many years by men, women and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women and children must have passed from the cars to this platform in entire safety. Under such circumstances, how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it was devoted. In the case of a platform which had always been safe, and answered its purposes for men, women and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe, or convenient? * * * In Burke *vs.* Witherbee (98 N. Y., 562), while an empty car was descending a mine, the hook which fastened it to the cable became detached from the car and it ran down the mine and killed the plaintiff's intestate. The judgment for plaintiff was reversed because there was not sufficient proof of actionable negligence on the part of the defendant. The judge, writing the opinion said: 'In this mine alone cars drawn by a hook must have made several hundred thousand passages without a single accident.

What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or definite test could it have been subjected to before a mine owner could use it without the imputation of negligence? It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which, in varying conditions, upon countless occasions, answered its purpose, without injury to any one.' The application of these authorities to this case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness. A careful consideration, therefore, of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff. It was a misadventure, and no rule of law will permit us to charge the misfortune, in whole or in part, to the defendant."

To the same effect is Frobisher *vs.* 5th Ave. Trans. Co., 151 N. Y., 431.

Following the line of decisions by the New York courts above quoted, the plaintiff in this case utterly failed to establish that the defendant was guilty of the breach of any duty which it owed to the decedent, because the defendant could not reasonably have anticipated that what actually happened to the decedent would happen, and, therefore, under all the facts, it was not shown that the defendant was guilty of any negligence.

Reasonable Anticipation.

Whether the defendant could reasonably have anticipated the happening of the accident must be measured by the circumstances *before* the accident, not *afterwards*.

It is easy to confound subsequent knowledge, acquired by the happening of the event, with that which was apparent prior to the occurrence. It would not be fair to measure a man's foresight by his hindsight. This rule is fully sustained by the authorities.

In American Express Company *vs.* Smith, 33 Ohio State, 511, the court said:

> "They (defendants) cannot be said to have been in fault in not anticipating what perhaps nobody thought was a probable or possible event. There is an *ex post facto* wisdom, which, after everything has been done, without success, can suggest that something else should have been attempted, but this is a sagacity, much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best lights afforded."

In Libby *vs.* Maine Central R. R. Co. (Me.), 20 L. R. A., 812, it was said:

> "The test of liability is not whether the company used such particular foresight as is evident, after the accident happened, might have averted it had the danger been known, but whether it used that degree of care and prudence which a very cautious and prudent person would have used under apparent circumstances of the case to prevent the accident, without reasonable knowledge that it was likely to occur." (Citations.)

In Cornman *vs.* Eastern Counties Railroad Company, 4 Hurlst. & N., 781, Baron Bramwell said:

"It is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event."

In American, etc., Ass'n *vs.* Talbot, 141 Mo., 674, it is said:

"Numerous authorities hold that it is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened.

"Ray, in his work on Negligence of Imposed Duties, pages 133, 134, says: 'Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. The duty imposed does not require the use of every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, *after the accident*, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident. * * * The prudence and propriety of men's doings *are not judged by the event*, but by the circumstances under which they act. If they act with reasonable prudence and good judgment, they are not to be made responsible because the event, from causes which could not be foreseen, nor reasonably anticipated, had disappointed their expectations.'"

In Nashville & Chattanooga R. R. Co. *vs.* Davis, 6 Heisk., 261, it was said:

"How could the plaintiff in error be reasonably required to use all means to obtain information of an event about approaching in the shape of a freshet, that all past experience in like matters had furnished no previous example, nor any reason on which the use of such means should be demanded? In other words, how could the company be held responsible for not anticipating and preparing for that, which human

> sagacity, surrounded by the precise state of facts, and with a knowledge of the past history of rises in the river, which surrounded the party here, and with the facts known to defendant's employés, could not have anticipated, unless we require in such case a prescience, such as no human being can either claim or be responsible for not exercising."

The true rule as to defendant's liability seems to be as stated in Cooley on Torts, 15:

> "According to the later authorities, foreseeableness, as an element of proximate cause, does not depend upon whether an ordinarily prudent man would or ought in advance to have anticipated the result which happened, but whether if such result and the chain of events connecting it with the act complained of *had occurred to his mind*, the same would have seemed natural and probably according to the ordinary course of nature."

The doctrine of reasonable anticipation clearly means that it shall be considered and applied in the light of all the facts and circumstances attending the particular transaction at the time, and that men shall be held to that degree of foresight as is reasonably to be expected in the conduct of the everyday affairs of life.

And, as said by this court in the Calhoun case, *supra:*

> "Even when the highest degree of care is demanded still the one from whom it is due is bound to guard only against *those occurrences* which can reasonably be anticipated by the utmost foresight."

The doctrine of reasonable anticipation is the true criterion by which the apparent conflict of authority may be reconciled, as has been said by authority quoted. It is upon the question of what consequences are the natural and probable result of the wrongful act, or might have been reasonably anticipated by the wrongdoer, that the decisions diverge.

In the case at bar, in point of time the fall of the plaintiff's decedent was the immediate cause of his injury. It is un-

questioned in the record that the car did not jump or jerk; nothing out of the ordinary happened in its operation; nothing happened that caused any injury or set in motion any other cause which resulted in injury, until the fall. This was the initial fact that set in motion the subsequent events which resulted in death.

Something caused the fall, the record is silent as to its cause, no one can fix responsibility on any person as the author of this first act which may have started so far as this record shows *in articulo mortis*.

Can it be said that death was the final result, which should have been anticipated upon the failure to do the acts complained of?

Shall it be held that to have the collapsible door of a passenger elevator open, while engaged in transporting a single passenger in the apparent use of all his faculties, and in apparent health and vigor, one who himself had travelled this way often before and on this particular journey was located well back in the car, will charge the defendant with apprehension of the ultimate consequences of this strange and unexplained casualty. If such shall be the case, then we shall impose on ordinary human beings a degree of prevision that common experience has shown they never can attain.

If this defendant shall be held to respond in damage for failure to use the preventive measures that would under every possibility have avoided this accident, then he is held to a higher degree of care than the law imposes and makes him the absolute insurer of the lives of passengers while engaged in transportation.

> "His duty is not to be estimated by what after the accident then first appears to be a proper precaution against the recurrence of it."
>
> McGrell *vs.* Buffalo Co., 153 N. Y., 265.

To the same effect are:

> Empire State Cattle Co. *vs.* Atchison, 135 Fed., 135, *supra*.
>
> Smith *vs.* Western Rwy. Co., 91 Ala., 455.

Plaintiff's Cases Considered.

Among the cases relied upon below by ~~defendant~~ plaintiff to support his theory, including the cases referred to in the opinion of the Court of Appeals are Patton *vs.* Southern Ry. Co., 82 Fed., 980; Hayes *vs.* Michigan Central, 111 U. S., 228; McDowell *vs.* Toledo Ry. Co., 74 Fed., 104; Choctaw Ry. *vs.* Holloway, 191 U. S., 334.

Upon analysis those cases will not be found to be in conflict with the doctrine of anticipation we assert, nor to be applicable to the state of facts this case presents.

In Patton *vs.* The Southern Railroad Company, 82 Fed., 980, the decision is by Judge Brawley, and Mr. Chief Justice Fuller, sitting on circuit, concurred in the opinion. The facts are briefly these: Plaintiff, a conductor of defendant's train, was injured by derailment of the train on a sharp curve at the foot of the steep grade from Saluda to Melrose, N. C. The grade is about 260 feet to the mile and about three miles long from Saluda to Melrose. It appeared that previous accidents had occurred at the same place and from the same cause. There was evidence that a guard-rail at that point would be a great safeguard.

The court could never have arrived at the conclusion it did without applying the doctrine of anticipation. It was because accidents of this nature had *frequently* occurred at this *very place* and in the *very manner* detailed here that the court reached its conclusion. It was because the railroad company should have foreseen—should have anticipated from the previous accidents—that just such an accident was likely to occur, and should therefore have done all in its power to prevent a recurrence.

We quote from the opinion:

> "In view of the testimony that accidents of this nature had frequently occurred at this very place, and in the very manner detailed here; that it was an extremely steep grade—a dangerous place, where ac-

> cidents were *likely* to occur—we hold it was an obvious duty of the defendant company, not only to take every precaution to prevent such accidents, but also to provide against the consequences thereof, and to minimize the dangers *likely* to flow therefrom, if they could not in the nature of things be prevented. * * * Our records show another case at this term where a train was derailed at this same spot, and the testimony showed that accidents had been frequent there."

The knowledge that the railroad acquired by the frequent happening of accidents at this spot and the likelihood of the recurrence of such accidents—in other words, that the defendant should have foreseen this very accident—is the foundation of the decision.

The Hayes case, 111 U. S., 228, also relied upon below by counsel for plaintiff, cannot be said to be in conflict with the reasonable anticipation doctrine, as we believe that rule of law to be. In that case the railroad company had violated a statutory duty to fence a certain portion of its tracks. The statute required the railroad company to fence, "to prevent animals from straying on its tracks and to secure persons and property from danger." The fence became broken and was allowed to remain in that condition at a point of all points where an accident was most likely to occur—a point opposite a tract of public ground, free to all, frequented by children and others as a place of resort for recreation. Plaintiff, a deaf and dumb boy of nine years of age, got through the broken portion of the fence, upon the tracks of the defendant, and was injured by a passing train.

The defendant could not have been heard to say that this injury was not one that could reasonably have been anticipated or foreseen under the circumstances, for the reason that the very object of the ordinance was to call its attention to the specific state of facts out of which the injury grew, and if possible to prevent such injuries. The ordinance was designed, amongst other things, to take away and to abolish

as a defense, the question of "reasonable anticipation," and imposed the statutory duty to apprehend just this sort of thing at the place of injury.

Therefore, under this state of facts, the causal connection was proximate, even though there was an independent intervening agency; the injury was one that was pointed out by the ordinance as likely to occur. The thing that happened was the expected, and the defendant's failure to perform its statutory duty fixed the causal connection and the consequent liability.

But for the ordinance the defendant could have interposed the defense of reasonable anticipation. For illustration: If the District of Columbia had passed a similar ordinance, declaring that all passenger elevators should have and use collapsible doors for the protection of persons against injury and death, then this defendant's attention would have been called to a probable danger consequent on a given default, in a most potential way; and it would have been deprived of its defense of reasonable anticipation; but such is not the case for the obvious reason that neither the defendant nor its agents, in the discharge of its duties, had such a result in mind as a natural consequence of its alleged default, nor did the law-making body which guards the public interest.

Nor can McDonald *vs.* Toledo Ry., 74 Fed., 106, be said to be in conflict with this doctrine. As in the Hayes case, the violation of duty was the violation of a *city ordinance*. The method of relieving its own tracks by piling snow in conical masses along the street was, to quote the language of the court, "in violation of the city ordinance which constituted a contract between the city and the street railway company, and by which defendant was bound to remove snow from its tracks in such way as to distribute the removed snow evenly over the surface of the street '*so as in no manner to interfere with the free use and occupation of the same by the public*'." And for the reasons set forth with respect to the Hayes case made the accident a thing reasonably to be anticipated and rendered the causal connection proximate.

The decision in the case of Choctaw, etc., R. Co. *vs.* Holloway, 191 U. S., 337; 48 L. Ed., 207, is in no wise in conflict with the reasonable anticipation doctrine, for the reason that the railway company clearly should have foreseen the probability of irresponsible animals coming upon its tracks in front of moving engines and trains, and the consequent necessity for brakes sufficient to stop its trains under such circumstances. The daily occurrence of this sort of obstruction upon railway tracks, and the probable injury resulting from inadequate brakes under such conditions, is quite as strong and forceful a reminder of the absolute necessity of brakes as a statute requiring their use.

In any case where the court in rendering its opinion has used the phrase "*causa sine qua non,*" if one will look with great care at the particular facts of that case, it will be seen that the defendant was held liable only because the causal connection was obviously proximate, as, for example, where there has been a violation of an ordinance directed to prevent the particular mischief which occurs.

The unadvised use of this phrase as a touchstone to determine questions of proximate cause will lead to inextricable confusion. To illustrate: There is no case upon this brief where a defendant has been held not liable because his negligence was a *remote* cause of an accident that such remote cause would not be "a cause without which the injury would not have occurred." No antecedent fact of a particular event, however remote, but is a "*causa sine qua non.*"

If, in the Calhoun case, the defendant had not left the truck in a dangerous position the accident "would not have occurred." It was in a broad sense a "*causa sine qua non.*" And it is just that broad application that the Court of Appeals adopted and that plaintiff would have this court adopt in this case, but which, to our minds, seems obviously wrong.

Direction of Verdict.

It is undoubtedly true that what is the proximate cause of an injury is ordinarily a question for the jury, but where the whole evidence offers no substantial dispute on material points, and is of such conclusive character that the court in an exercise of sound judicial discretion would be compelled to set a verdict aside returned in opposition to it, it is not only the province but the duty of the court to direct a verdict.

Guenther *vs.* Met. R. R. Co., 23 App. D. C., 493.

As was said in Teis *vs.* Smuggler Mining Co., *supra:*

> "The final contention on behalf of plaintiff in error is that the question of proximate and remote cause should have been submitted to the determination of the jury. Where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury; but where, as in this case, there is no dispute about the facts, and the law pronounces the judgment on the facts established, it is the province and duty of the court to direct a verdict. This has been so ruled in respect of this character of action. Hoag *vs.* Lake Shore & M. S. Ry. Co., *supra;* S. S. Pass Ry. Co. *vs.* Trich, *supra;* Goodlander Mill Company *vs.* Standard Oil Company, 63 Fed., 400, 407; 11 C. C. A., 253; 27 L. R. A., 583; Cole *vs.* German Savings & L. Association, *supra.*"

Since there was no practical conflict in the testimony, no substantial dispute about the material facts, it was unquestionably the duty of the court to direct a verdict. The facts were not of such character that different minds might draw different conclusions from them. There was, in fact, nothing to be submitted to the jury for determination.

In practically every case upon our brief it was held that

a verdict should have been directed. Among them are the following:

Sheffer *vs.* Railroad Co., 105 U. S., 249.
Railroad Co. *vs.* Elliott, 55 Fed., 949.
Empire State Cattle Co. *vs.* Atchison, 135 Fed., 135.
Butts *vs.* Railroad Co., 110 Fed., 329.
Goodlander *vs.* Standard Oil Co., 63 Fed., 400.
Cole *vs.* German Savings & Loan Ass'n, 124 Fed., 113.
Cleghorn *vs.* Thompson (Kan.), 54 L. R. A., 402.
Stone *vs.* Boston & Albany (Mass.), 41 L. R. A., 794.
Huber *vs.* La Crosse Ry. (Wis.), 31 L. R. A., 583.
Nelson *vs.* Lighting Co. (R. I.), 67 L. R. A., 116.
Hoag *vs.* Lake Shore Ry., 85 Pa. St., 293.
Railroad Co. *vs.* Trich, 117 Pa. St., 390; 2 Am. St. Rep., 672.
McClean *vs.* Town of Garden Grove, 83 Iowa, 254; 12 L. R. A., 482.
McGrell *vs.* Buffalo Office Bldg. Co., 153 N. Y., 165.

Second Assignment of Error.

The Court of Appeals said in effect in its opinion (Rec., 37-38) that there was sufficient evidence from which the jury might have found that the elevator boy did not stop the car within as short a distance as was possible; that he was negligent in not using the so-called emergency switch.

The undisputed testimony on this question shows that Peake as soon as he became aware that Pennington was about to fall released the lever (Rec., 8) and that it stopped the elevator within four or five inches (Rec., 10).

The witness Hanbury, produced by the plaintiff, says it would be "*pretty good activity*" to stop the car in the space of a few inches *by the use of the emergency switch*, considering

what an operator has to do, to see and take in when he sees a man in the act of falling (Rec., 18). How could negligence be predicated upon Peake's act in the face of this evidence of plaintiff's own witness and only witness on this point?

Immediately prior to this testimony Hanbury said (Rec., 18) that the release of the lever would stop the car ordinarily within twelve to fourteen inches, and that if it was stopped within *four or five* inches it was "*out of the ordinary*" and was "*unusually quick*" (Rec., 18).

Hanbury states upon the abstract proposition that an elevator can be stopped more quickly by the use of the emergency switch than by the use of the lever. But when interrogated with respect to the act of Peake in stopping the elevator under the peculiar circumstances of the case—stopping the elevator within a few inches—he admits that it was "pretty good activity, out of the ordinary, and unusually quick." The more general proposition is limited by the direct testimony as to the facts *of this case*.

It is so obvious from a consideration of the whole record that under the particular circumstances of the case the car was stopped in as short a distance as possible, and a jury could not have found the facts to be otherwise. From what evidence would the jury have been justified in finding that the elevator could have been stopped, under the circumstances of the case, in less time than Peake stopped it?

Conclusion.

Under the undisputed facts of the case the court should have directed a verdict for the defendant. Assuming the acts of omission of the defendant relied upon by plaintiff as negligence to have been negligence, none was the proximate cause of the injury to plaintiff's intestate.

As said in the Kellogg case, in order to warrant a finding

that negligence, or act not amounting to a wanton wrong, is the proximate cause of the injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances.

Tested by these rules, it is easy to perceive that plaintiff's case utterly fails to show that any act of the defendant was the proximate cause of Pennington's injury, but rather that the moving, the efficient, the proximate cause was his own independent act. Can it be said that as a result of not using inner doors or of omitting to do any of the several things claimed by the plaintiff as negligence on the part of the defendant that it was the reasonable and probable thing that some one, riding upon an elevator in perfect condition, when the car was not crowded and the elevator running smoothly, would fall without apparent cause, *when no such accident had ever happened there before, or, as far as the record shows, anywhere before?* Can it be said that defendant could have foreseen and guarded against this extraordinary occurrence? To ask these questions is to answer them.

If there had been any evidence from which the jury could have found that Pennington's *fall* was caused by any wrongful act or omission on the part of the defendant, then it would have been proper to have submitted the case to the jury for them to ascertain that fact, but there was no such evidence. All the evidence in the case shows, and shows conclusively, that Pennington's *fall* was not caused or occasioned by the defendant. The plaintiff never contended—cannot contend under the evidence—that defendant caused his intestate's *fall*. He is forced to say he does not know the cause! Before this court could hold that defendant was liable, it would have to find *some evidence* showing that defendant's wrongful act or omission caused Pennington's ***fall.***

We submit that if it had been necessary for the owner and operator of an elevator to use an inner door upon the car itself, in addition to the usual door in the elevator cage, in order to fulfill his duty to use reasonable care to provide for the safety of passengers thereon, or that such an occurrence as this could have been reasonably anticipated, the use of such an appliance would have been provided for in the requirements and regulations as to the use, operation, and maintenance of elevators in the District of Columbia set forth in the Building Regulations for this District. No such requirement is, however, mentioned in said regulations.

If, from the tangled skein of decision upon this subject, a single certain thread can be drawn, it is that of "reasonable anticipation." This, then, is the infallible test by which these complex and perplexing questions may ever be accurately measured and justly determined.

When the case at bar is subjected to this test, we believe with implicit confidence that this court will reach the conclusion that this defendant could not reasonably have anticipated this extraordinary accident.

We think that it has been demonstrated beyond question that Pennington's fall was an independent act, for which defendant was in nowise responsible, intervening between the alleged negligence and the injury, and, in the language of Mr. Wharton, "insulated the negligence"; that his act in falling, without apparent cause, upon an elevator in perfect condition, uncrowded, and running smoothly, was an occurrence so unusual, so out of the ordinary, so unprecedented that it could not have been foreseen or anticipated as reasonably likely to happen; that therefore the negligence charged against defendant was not the proximate cause of the plaintiff's intestate's injury, and the jury should have been instructed to return a verdict for the defendant.

We respectfully submit that upon all the evidence in this case it was apparent as a matter of law that the defendant

was not liable and that the court should have directed a verdict in his favor, and that therefore the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 40.

FRANK A. MUNSEY, *Plaintiff in Error,*

vs.

WESLEY WEBB, ADMINISTRATOR OF THE ESTATE OF SAMUEL T. PENNINGTON, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

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TABLE OF CASES.

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BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This action was instituted by the defendant in error, administrator of the estate of Samuel T. Pennington, in the Supreme Court of the District of Columbia, to recover damages on account of the death of Pennington while a passenger on an elevator owned and operated by the plaintiff in error in the

Munsey Building, in the City of Washington. The defendant in error will hereafter be spoken of as the plaintiff and the plaintiff in error as the defendant. The trial resulted in a judgment in favor of the plaintiff for seventy-five hundred dollars. (Rec., p. 5.) An appeal was taken by the defendant to the Court of Appeals of the District of Columbia, where the judgment below was affirmed. (Rec., p. 38.) It will appear from the bill of exceptions that Pennington was at the date of his death and for some time prior thereto, a clerk in the Treasury Department of the Government, which then had offices on the fifth, sixth and seventh floors of the Munsey Building; that he enjoyed very good health and had never been known to have vertigo, faint, fall down nor have a doctor; that he was temperate, industrious and never drank intoxicating liquors; he was thirty-one years of age and a few days prior to his death was graduated from the National University Law School of this city and had been recommended for promotion in the Treasury Department to take effect on July 1, 1908; that he left his wife and his home in this city in good health at a quarter past eight o'clock on the morning of the 15th of June, 1908, to go to his office in the Munsey Building; he arrived there about nine o'clock A.M. and took passage for transportation to his office on one of the elevators provided in said building.

At this point it is well to consider the construction of the elevator and the elevator shaft. The elevator is located five and three-quarter inches from the grill work (defendant's witness Evans, Rec., p. 27), and concrete floors a foot and a half thick project at right angles through the grill work into the elevator shaft about three and one-half inches. Mr. Hanbury, Chief Inspector of Elevators for Baltimore City, testified that to safely operate the elevator "the grill work should have been nearly flush with the concrete floor

and then the concrete floor would have hardly projected any into the shaft, possibly a quarter of an inch." (Rec., p. 16.)

Notwithstanding the distance separating the elevator from the shaft in the Munsey Building and the projection into the shaft of concrete floors a foot and a half thick, these floors were unprovided with flares or fenders. (Rec., p. 10.) According to the testimony of Mr. Reubsam, of the Supervising Architect's Office for the Treasury Department (Rec., p. 20), and the Chief Inspector of Elevators for Baltimore City (Rec., p. 16), a flare or fender as the term is used in elevator construction is an inclined piece of sheet metal extending from the under side of a floor projecting into an elevator shaft and carried back on an incline to the shaft grill, so as to prevent any part of a passenger's body from being caught against the under side of the floor. By presenting an inclined surface rather than a right angle a fender has a tendency to shove back any object with which it comes in contact.

In addition to the doors at each landing the *elevator had an inside collapsible door, but the inside door was open at the time of the accident.*

By a rule of the defendant promulgated prior to the accident, of which notification had been given to the elevator boy in charge of the car which killed Pennington, the elevator boys were required to have one hand on the lever of the elevator and the other hand at all times thrown across the door of the car, resting upon the iron work thereof. Defendants' agent in charge of the building was continually after the elevator boys about this rule. (Rec., p. 14.) When the operator's hand was extended across the door of the elevator "he caught hold of the space in the grating and could get a good grip." (Rec., p. 11.) The pain[illegible] the cage of the elevator was rubbed off where the

elevator boys put their hands across the door and on it. (Rec., p. 21.) Eight or ten inches below the controller of the elevator there was an emergency switch to stop the elevator very quickly and suddenly. To pull the emergency switch the operator of the elevator would not have to change his position. He could very easily pull it out with a finger and the quickest way to stop the elevator in question would be to pull the emergency switch. The elevator was an Otis elevator. (Rec., p. 16.) *Peake, the elevator boy* in charge of the car which killed Pennington, *was 19 years of age at the time of the accident and did not know that an emergency switch was on the car; he had never been instructed as to the use of the same.* (Rec., p. 8.) The elevator regulations in force in the District of Columbia at the time of the accident expressly required anyone running an elevator in the District of Columbia to "have a knowledge of the different parts of the machinery attached to or necessary in running such elevators and understand the application thereof." (Rec., p. 15.) The plaintiff offered to prove by Joseph F. Ryan that between the 1st day of April, 1908, and until a few days prior to the accident he was employed as an elevator boy to operate the elevator which killed Pennington; that between those dates this elevator refused on a number of occasions to respond to the lever and without apparent cause jerked and fell; that he communicated these facts to his brother Cornelius Ryan, who was then superintendent of the building, and requested that he be relieved from duty upon the elevator. *In accordance with these requests his brother took him off of the elevator a few days prior to the accident.* The plaintiff offered further to prove by Cornelius Ryan that his brother did communicate the above mentioned facts to him and that he, Cornelius Ryan, knew that this elevator did not respond to the lever and fell and

jerked without reason, and that he took his brother off the elevator for the reasons stated in the proposed testimony of his brother. (Rec., p. 14.) The plaintiff offered further to prove by Coolidge, the agent in charge of the building, that the elevator which killed Pennington had accidently dropped and failed to respond to the lever within two or three weeks of the accident and that these facts were communicated to him by the elevator boy in charge of the car. Upon defendant's objection, the court refused to permit the plaintiff to prove by Joseph F. Ryan, Cornelius Ryan or Coolidge, the facts above set forth, to which the plaintiff noted an exception. The court, however, did permit the plaintiff to prove by Joseph F. Ryan that he had worked on the elevator in question "close on to three months and had *ceased to work on it about three days before the accident.*" (Rec., p. 21.) The Inspector of Elevators for the District of Columbia, who was placed upon the stand by the defendant, in response to the question asked by the plaintiff on cross-examination whether he had not complained to the manager of the building about the condition thereof between the time of the accident and two and a half months prior thereto, replied "that he was not positive that he had not so complained."

On the morning of the 15th of June, 1908, while a passenger on the elevator, Pennington was killed by the crushing of his head and neck. At the time of the accident the only persons upon the elevator were the deceased and the elevator boy running the car. It therefore became necessary for the plaintiff to place upon the stand the defendant's employee at the time of the accident by whose negligence we contend Pennington was killed. He was an unwilling witness for the plaintiff as will appear from his examination on pages 9 to 21 of the record, whereas nearly all of the cross-examination of the elevator

boy was conducted by defendant's counsel asking leading questions to which Peake replied "yes." (See statement of record p. 10.) The elevator boy described the accident as follows:

> "Mr. Pennington and another gentleman entered the elevator at the first floor. The other gentleman got off at the second floor. Witness closed the door and started up—he passed the third and fourth floors and was between the fourth and fifth when Pennington reeled and fell backward and was caught between the floor and the elevator; that there is a space of, he judged, four or five inches between the grating on the fourth floor and the fifth floor. Pennington was caught just below the fifth floor; that when he became aware Pennington was about to fall, he released the lever with his right hand and threw his left hand in an effort to stop him from falling." (Rec. p. 8.)

He admitted that he had left open the inside collapsible door and that it was not closed at the time of the accident and testified that he could not say whether there was any way the accident could have happened if this door had been closed instead of open. (Rec. p. 9). Much difficulty was found in getting the witness to say whether in accordance with the defendant's rules witness' arm was across the open door. In the end, however, he testified in response to the question, "*Now then to the best of your recollection where was your left arm just when Mr. Pennington started to fall. Answer. At my side.*" (Rec. p. 9.) Difficulty was also had in getting the witness to state the distance the car was below the fifth floor when Pennington started to fall. He said he could not say positively and variously estimated the distance at very nearly a foot, about a foot, maybe a little over a foot, not over a foot and a half below the ceiling of the fifth floor (Rec., pp. 8, 9), and ended

by saying that the elevator stopped "at about two feet or so below the fifth floor." (Rec., p. 21.) In response to a leading question from the defendant's counsel he stated that his releasing the lever stopped the elevator within four or five inches, but upon re-examination he stated "that he is not positive what distance the elevator went after Pennington started to fall." (Rec. p. 11.) He further testified:

> "*That he released the lever, but he does not know whether that stopped the car*, or whether his body (meaning Pennington's) caught or not (Rec. p. 20). * * * That as near as he can remember, his, Pennington's head was out of the elevator car and that the rest of his body was in the car and that his head came in contact with the under part of the projection of the fifth floor (Rec. p. 20). That at the time Pennington started to fall, the elevator was going at full speed. That he cannot say positively at what point he put on full speed. (Rec. p. 9.) * * * Then when the lever is released it goes to the center: * * * *that you could carry the lever over from ascending to descending without letting it stop, but it would burn the fuse out; that he did not know whether there was an emergency switch on the elevator or not.*" (Rec. p. 8).
>
> That when Pennington started to fall he was standing on the witness' left and about midway back in the car. (Rec. p. 10).

On behalf of the plaintiff, Mr. Hanbury, Chief Inspector of Elevators for Baltimore City since November, 1906, and prior to that time Constructor of Elevators for the Otis Elevator Company, testified that he had examined for the plaintiff the elevator in question and that it is an Otis elevator and has an emergency switch next to the controller, about eight or ten inches below it, which

is put there in case of emergency to stop the elevator very quickly and suddenly. It is not at all difficult to operate and could be pulled out very easily with a finger; *that the quickest way to stop an Otis elevator is to pull the emergency switch*, the effect of which is to break the circuit which opens the potential switch, causing the elevator to come to a dead stop; the only motion that is left in the car is what is left in the sag on the cable; *that this would allow on the elevator in the Munsey Building about an inch each way up and down;* that the emergency switch breaks the current in a different manner from permitting the lever to go back to neutral; that if you *normally* cut the current of an elevator the brake appliances are given time to work which stops an elevator *normally* in about twelve to fourteen inches; that when the emergency switch is used an entirely different phase of construction is brought into place, it being so designed that the circuit breaker falls out, short circuiting the armature and choking the current; this holds the elevator dead; holds it in a gripping manner. On cross-examination Hanbury testified that it would be pretty good activity to stop a car in a space of five inches, which is too quick for ordinary travel. An examination of the record (p. 18) makes it apparent that Hanbury was then speaking of stopping the car for ordinary travel and not at the time of an accident by use of the emergency switch. In continuation he said: "The emergency is supposed to act instantly being built for that purpose and cars can be and are stopped by it in less than five inches." He further stated on cross-examination:

> "Q. You are doing very well if you stop it in five inches, are you not? A. I won't say that even. I could not say you are performing it well.
>
> Q. Why don't you say it? A. If the elevator is in proper working order and the potential switch

or circuit breaker is wired up properly and the emergency switch on the car is connected in properly, if he severs this connection the tensile switch will fall out, as I told you, and short circuit the armature. By short circuiting the armature ,the drum is brought to a standstill and the only movement left is the play between the worm-gear and the gear on the drum shaft and the vibration in the cables and there is nothing left to it, and a practical demonstration would prove it to you." (Rec. p. 18.)

The Deputy Coroner of the District testified that he made a complete autopsy of Pennington's body, examined the brain and every organ thereof and found them to be in normal condition; he attributed death to the crushing of the lower part of the skull, face and neck and the hemorrhage that resulted therefrom.

Mr. Pennington's widow testified that he was a good husband to her and her sole means of support.

To off-set the testimony of the Chief Inspector of Elevators for Baltimore City, that the emergency switch creates a short circuit and stops the elevator more quickly than the use of the lever, the defendant placed on the stand three witnesses. White, an engineer in the Munsey Building, who testified that neither the emergency switch nor the lever produced a short circuit. (Rec. p. 23.) Evans Inspector of Elevators for the District of Columbia, who testified that both the lever and the emergency switch created a short circuit (Rec. p. 26), and Foster, an Assistant Manager of the Otis Elevator Company, who testified that he did not know whether the lever or the emergency switch did or did not create a short circuit. (Rec. p. 29 and 30.) The Inspector for the District of Columbia, admitted, however, that one of the emergencies for which an emergency switch is put on the elevator is for use, if for any reason it is desired to stop the car instantly to

prevent accident (Rec. p. 26), but that the controller, that is, the lever, could be adjusted so as to stop the car instantly though that would harm the machine and it is left entirely to the judgment of the engineer. (Rec. p. 25.)

THE COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY.

ARGUMENT.

Degree of Care Required of Defendant in Constructing and Operating the Elevator.

Whether the defendant was negligent must be determined in the light of the care demanded of him. The defendant in constructing and operating the elevator was required to exercise the highest degree of care, anything short of which was absolute negligence. If Pennington's death might have been avoided in the exercise by the defendant of extraordinary vigilance, aided by the highest skill, extending to all the agencies or means employed in his transportation, the defendant is responsible for his death.

> *"We see no distinction in principle between the degree of care required from a carrier of passengers horizontally by means of railway cars or stage coaches and one who carries them vertically by means of a passenger elevator.*
>
> *The degree of care required from carriers by railway or stage coach is the highest degree—neither is an insurer, but, in regard to each, care short of the highest degree becomes, not ordinary care, but absolute negligence.* Speaking of the degree of care required from a railroad company, the Supreme Court in Penn. Co. vs. Roy, 102 U. S., 458, said: *'He is responsible for injuries received by passengers in the course of their transportation which might have been avoided by the exercise on his part of extraordinary vigilance aided by the highest skill and this caution and vigi-*

lance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger!"

Mitchell vs. Marker, opinion by Mr. Justice Lurton, 62 Fed., 139.

Holtzman vs. Douglas, 27 App. D. C., 126.

"There is no employment where the law demands a higher degree of care and diligence than in the construction and operation of passenger elevators. Their operation is necessarily to some extent dangerous. The control of the operator is absolute and the passenger is helpless so far as self-preservation is concerned. Powerful agencies of locomotion are employed while often the speed of travel is swift and the height attained perilous. Therefore, the highest degree of human care and foresight is required of those engaged in either the construction or operation of passenger elevators and they are responsible for the slightest negligence."

Webb on Elevators, sec. 7, and long line of cases. A. & E. Ency. of L. Vol. 10, p. 946, and cases.

The rule as above set forth is sustained by the overwhelming weight of authority. The courts of only two or three states in this country, including New York, require less diligence of carriers by elevators than they require of carriers by railway cars. (Webb on Elevators, sec. 9.)

All the cases cited by the defendant on the question of negligence are taken from the New York courts.

The Defendant was Guilty of Negligence.

First.

The Defendant was Negligent in the Construction of the Elevator Shaft.

Concrete walls a foot and a half thick projecting into an elevator shaft through which passengers are rushed at a

high rate of speed recklessly endanger lives and limbs. The Chief Inspector of Elevators for Baltimore City testified that in order to safely operate the elevator the grill work of the shaft should have been nearly flush with the concrete floor, so as to have prevented the floor from projecting into the shaft beyond possibly a quarter of an inch. (Rec. p. 16.) The crushing of Pennington's head killed him. According to the elevator boy Pennington's head came in contact with the under part of the projection of the fifth floor. (Rec. p. 20.) It was for the jury to say whether the highest skill and foresight in the construction of the shaft would permit the existence of such a condition. Where walls project into elevator shafts the Chief Inspector of Elevators for the City of Baltimore, and an employee in the Supervising Architect's office in the Treasury Department of the United States, both testified to the use of fenders to avoid injury to passengers by presenting an inclined plane having a tendency to shove back an object, rather than a right angle of concrete, contact with which almost necessitates death. It was for the jury to say whether the exercise of extraordinary vigilance did not require fenders. The elevator was constructed away from the elevator shaft an unusual distance, practically a half foot. At the time of the accident there was no Building Regulation in the District of Columbia recognizing the increased danger to passengers in the construction of elevator cars an unusual distance from the shaft. The danger of such construction is a physical fact of which the defendant in the exercise of the highest care should have been aware regardless of Police Regulation. In the District of Columbia, subsequent to the accident, was promulgated an Elevator Regulation tardily recognizing the increased danger to passengers where the elevator is set back from the elevator shaft and requiring, if a distance of four

inches separates them, inside collapsible doors as an additional safeguard. (Bldg. Reg. of D. C. p. 203.)

Second.

The Defendant was Guilty of Negligence in Failing to Keep Closed the Inside Collapsible Door.

Though at the time of the accident there was no regulation in the District of Columbia requiring the elevator to have an inside collapsible door, yet in view of the dangerous condition created by the unsafe construction of the elevator shaft, if there had been no inside door, it probably would have been a question for a jury whether the omission of the defendant to provide an inside collapsible door was not negligence. In this case, however, the defendant provided an inside collapsible door, the use of which would have prevented injury to the plaintiff, and the question is not, was the defendant obliged to provide such a door, but having provided it, was it not a question for the jury whether extraordinary diligence required its use. The obvious purpose in providing the inside door and the only use to which it could have been put, was by closing the same to prevent any part of a passenger's body from extending beyond the car into the shaft. With this safety appliance at hand, in consideration of the extraordinary vigilance required of the defendant can it be said that "all reasonable men would of necessity draw" the conclusion that the defendant was exercising the highest care in failing to use the same?

A similar question has arisen where street railroads after providing gates upon the cars on the side next to the other track, fail to keep them closed. This omission has been held clearly to constitute negligence. The degree of diligence required with respect to passengers in the operation

of street cars and elevators is the same and it is respectfully submitted the cases cannot be differentiated.

> "But whether the failure to have such gates will or will not be ascribed as negligence, it is clear that if the company does have them it may be negligence to fail to keep them closed." * * *
>
> Thompson on Neg. sec. 3528.

> "There may be no negligence whatever in failing to have gates, for the very highest order of equipment may be dispensed with, provided the equipment is sufficient to come up to the standard of extraordinary diligence. This standard may be reached short of the very best of the superlative of the attainable. *But when a company has provided gates, due diligence might require it to use them and failure to use them might be negligence in the given instance. Whether it would be or not, is a question of fact for the jury.* There was no error in so treating it. And this is so irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. A hackman might put brakes on his hack for use in descending mountains only, and might restrict the use by his own practice to the making of such descents, but having them upon his vehicle it might be negligence not to use them on proper occasions in descending ordinary hills, as well as mountains. *Extraordinary diligence may require the carrier to use what he has, though it would not require him to have as much as he has provided.*"
>
> Augusta Railroad Co. vs. Glover, 92 Georgia, 145.
>
> Adams vs. R. R., 9 D. C. App., 26.

This rule has been applied where vestibule doors between cars were left open by steam railroads.

Crandall vs. Railway Co., 96 Minn., 434; 2 L. R. A., new series, 645.

Bronson vs. Oakes, Receiver, etc., 76 Fed., 734.

Third.

The Failure of the Elevator Boy to Obey the Rule of the Defendant and Keep his Arm Across the Open Door Was Negligence.

According to the testimony of the manager of the defendant in charge of the building at the time of the accident, one of his duties, was to instruct the elevator boys. In lieu of requiring the collapsible doors to be kept closed the defendant's manager promulgated a rule requiring the elevator boys to keep one arm across the open door. He had imparted this rule to Peake before the accident and was continually after the elevator boys about complying with same. The paint had been rubbed off the cage of the elevator where the boys rested their hands in compliance with this rule. According to Peake his arm was across the open door until another passenger got out at the second floor, that is, a second or two before the accident, but when Pennington was killed Peake's right hand was on the lever *and his left hand was at his side.* (Rec. p. 9.) Electing to make no use of the inside collapsible door, but providing a rule obviously intended to take its place, the only possible purpose of which was to prevent passenger's bodies from in any manner getting beyond the gate of the car, it cannot be assumed, as a matter of law, that a failure to observe this rule was immaterial to the injured person and his rights not affected thereby. The defendant ordained this rule affecting the safety of passengers, in compliance with a duty requiring him in the exercise of extraordinary vigilance to consider methods in operating the car and it constitutes evidence of what the defendant thought necessary and proper in providing for the safety of passengers.

> "In the Lowell case, as in this, *it was shown that a rule of the company*, applicable where double tracks

were operated, prohibited any train, either passenger or freight, from attempting to run past a passenger train standing at station for the purpose of receiving or discharging passengers, until the passenger train at the station had moved on, or signal was given by the conductor of the standing train for the other train to come ahead. *Speaking of such a rule, and after declaring that it could not be seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule,* the court said (page 217): 'In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening this accident would probably not have occurred.'"

Warner vs. B. & O., 168 U. S., 339.

Chicago, etc., Ry. vs. Lowell, 151 U. S., 209.

A car struck the plaintiff's carriage. The motorman did not sound the gong. Plaintiff offered in evidence a rule of the defendant, which required the sounding of gongs when passing other cars or vehicles. The Massachusetts court said in an opinion by Chief Justice Knowlton:

"The only exception now relied on by the defendant, is to the admission in evidence of the defendant's rule in regard to sounding the gong in connection with testimony that defendant's motorman disobeyed the rule, and that this disobedience was one of the causes of the accident. The decisions in different jurisdictions are not entirely harmonious upon the question now raised, but we are of the opinion that the weight of authority and of reason tends to support the ruling of the judge in the present case. * * * A violation of rules previously adopted by the defendant in reference to the safety of third persons has generally been admitted in evidence, as tending to show negligence of the defendant's disobedient servant, for which

the defendant is liable. The admissibility of such evidence has often been assumed by this court without discussion (citing a number of Massachusetts cases). See, also, in other courts, Chicago, etc., Railway vs. Lowell, 151 U. S., 209; Warner vs. B. & O., 168 U. S., 339. * * *

The evidence is somewhat analogous to proof of the violation of an ordinance or statute by the defendant or his servant, which is always received as evidence, although not conclusive, of the defendant's negligence. Such an ordinance or statute enacted by a body representing the interests of the public, imposes *prima facie* upon everybody a duty of obedience. Disobedience is therefore a breach of duty unless some excuse for it can be shown which creates a different duty, that, as between man and man, overrides the duty imposed by the statute or ordinance. Such disobedience in a matter affecting the plaintiff is always competent upon the question whether the defendant was negligent. *So a rule made by a corporation for the guidance of its servants in matters affecting the safety of others is made in the performance of a duty, by a party called upon to consider methods and determine how its business shall be conducted.* Such a rule made known to its servants, creates a duty of obedience as between the master and servant and disobedience of it by the servant is negligence as between the two. *If such disobedience injuriously affects a third person it is not to be assumed in favor of the master that the negligence was immaterial to the injured person and that his rights were not affected by it. Rather ought it to be held an implication that there was a breach of duty towards him as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such cases.* Against the proprietor of a business, the methods which he adopted for the protection of others are some evidence of what he thinks necessary or proper to insure their safety."

Stevens vs. Railroad, 184 Mass., 478.

Fourth.

The Defendant was Guilty of Negligence in Operating the Elevator by a Boy Who Did not Know That There Was an Emergency Switch Upon the Same.

It is conceded that the elevator had thereon an emergency switch. The Chief Inspector of Elevators for Baltimore City and one of the defendant's experts testified that the use of this emergency switch was to stop suddenly a car at the time of an accident, and the plaintiff's expert testified that the use of the emergency switch was the quickest way to stop the car. The elevator boy admitted that he did not use or attempt to use the emergency switch; that he did not, in fact, know that there was such an appliance upon the elevator and that he had never received any instructions in respect thereto. The defendant's conduct in putting a 19-year-old boy in charge of the safety of numberless passengers of all ages and conditions, without instruction as to the appliances provided to prevent accidents and in express violation of the regulations in force in the District of Columbia, was not only a failure to exercise extraordinary diligence, but was gross negligence amounting almost to a wilful disregard of his duties.

Fifth.

It Was for the Jury to Say Whether the Elevator Boy Was Negligent in Not Using the Emergency Switch When He Became Aware of the Fact That Pennington Was Falling.

The Inspector of Elevators for Baltimore City, formerly an Otis elevator employee, testified that the use of the emergency switch would stop the elevator immediately, allowing about one inch for sag up and down (Rec. p. 17); that if the controller lever is released it comes back to a

neutral position which would stop the elevator in about twelve or fourteen inches (Rec. p. 17). The elevator boy testified that Pennington was standing in the center of the elevator car and that when he became aware that "Pennington was about to fall he released the lever with his right hand and threw his left hand in an effort to stop him from falling; that when the lever is released it goes to center; that you could carry the lever over from ascending to descending without letting it stop in the center, but it would burn the fuse out; that he made no attempt to use the emergency switch and did not know that it was on the car (Rec. p. 8)." When asked where the car was when Pennington started to fall the elevator boy replied that he could not state positively and variously estimated the distance at very nearly a foot, about a foot, maybe a little over a foot, not over a foot and a half below the ceiling of the fifth floor (Rec. p. 8, 9), and ended by saying that the elevator stopped "at about two feet or so below the fifth floor." (Rec., p. 21). In response to a leading question from the defendant's counsel, he stated that his releasing the lever stopped the elevator within four or five inches, but upon re-examination he stated "he is not positive what distance the elevator went after Pennington started to fall." (Rec. p. 11.) According to the elevator boy's testimony, he became aware of Pennington's peril before or at the time he started to fall, because as he expresses it, he released the lever "*when he became aware that Pennington was about to fall.*" Assuming that he instantly released the lever, but did not use the emergency switch, according to plaintiff's expert the car would travel from about twelve to fourteen inches, whereas had he used the emergency switch the car would have stopped instantly allowing an inch for sag. It is probable that Pennington's life would have been saved had the elevator stopped even two or three inches below where it did. Can it be said

that viewing this testimony "in its most favorable light toward the plaintiff that all reasonable men would of necessity draw" the conclusion that the elevator boy exercised due diligence after he became aware of the peril that confronted the deceased? The boy, probably because of his youth and the fact that he had received no instruction in the use of the emergency appliances in case of accident, was "in such excitement trying to stop the car that he does not know how Pennington was killed." (Rec., p. 20.) Plaintiff's expert testified that the lever controlling the elevator could be carried from ascending to descending without stopping at the central or neutral point (Rec. p. 16), but the boy in charge of the car released the lever and permitted it to go to the center without carrying it over to the descending point which would have at once started the car in its descent and almost immediately released Pennington's head. The boy left the car, went down to the ground floor and obtained assistance before returning, leaving the elevator crushing Pennington's head between it and the concrete floor.

II.

PROXIMATE CAUSE NOT IN CASE.

THE QUESTION OF PROXIMATE CAUSE ONLY ARISES IN CASE THERE WAS NO EVIDENCE WARRANTING THE JURY IN FINDING THAT BY THE EXERCISE OF DUE CARE THE ELEVATOR BOY, AFTER HE BECAME AWARE OF PENNINGTON'S PERIL, COULD NOT HAVE STOPPED THE CAR IN TIME TO HAVE PREVENTED HIS DEATH.

If the court should be of the opinion that the sole proximate cause of the peril that befell Pennington was his fall, and that the failure to close the door, or to have the eleva-

tor boy's arm across the door, or the projection of the concrete wall into the elevator shaft, or the absence of a fender upon the concrete wall was not a proximate cause of his death, still, if viewing the evidence in its most favorable light to the plaintiff, men could reasonably differ as to whether the elevator boy could have stopped the car in time to prevent Pennington's death after he became aware of his perilous position, the court below committed no error in submitting the case to the jury and its judgment should be affirmed. This is also true if there were evidence warranting the jury in finding that, but for the elevator boy's failure to reverse the lever and his departure from the car leaving the elevator crushing Pennington's head, Pennington would not have been killed.

The Court of Appeals held that there was evidence sufficient to take the case to the jury upon the question whether the elevator boy used due care after he became aware of Pennington's perilous position.

III.

PROXIMATE CAUSE.

First.

Proximate Cause is not a Question of Science, but is Ordinarily a Question of Fact for the Jury.

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact in view of the circumstances of fact attending it. * * * In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. * * * Such refinements are too minute for rules of social conduct. In the nature

of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Milwaukee, etc., Railway Co., vs. Kellogg, 94 U. S., 474.

"It is only when the facts are clearly settled and but one inference is possible to be drawn therefrom, that the question of proximate cause is one of law." Mr. Justice Noyes in Donnegan vs. R. R., 105 Fed., 87.

"The question here is not whether or not in our opinion the roughness of the track was the proximate cause of the explosion and the death, but whether or not all reasonable men of unprejudiced minds would draw that conclusion from the facts of the case, for if they would not the question was properly submitted to the jury." Mr. Justice Sanborn in Chicago R. R. vs. Price, 97 Fed., 429.

Union Pac. R. R. vs. Callaghan, 56 Fed., 991.

Southern, etc., R. R. vs. Yeargin, 109 Fed., 439.

Second.

The Defendant's Negligence was a Causa Sine Qua Non of the Accident.

In Hayes vs. Michigan Central R. R. Co., 111 U. S., 241, the facts were as follows: the defendant was required by a Municipal Ordinance to erect a fence between its railroad and a park; it permitted the fence at one point to remain broken, the plaintiff, a boy, while in the park near the break in the fence was motioned to by another boy on the passing train, whereupon the plaintiff started to run beside the train and as he did so, turned and fell, the car wheels passing over his arm. The trial court instructed

a verdict in favor of the defendant. On appeal this court reversed the judgment of the lower court and held: that the question of proximate cause should have been submitted to the jury, saying,

> "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. *In the sense of an efficient cause, causa causans, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it causa sine qua non, a cause which if it had not existed the injury would not have taken place, an occasional cause, and that is the question of fact, unless the causal connection is evidently not proximate.*"

In Choctaw, etc., R. R. vs. Holloway, 191 U. S., 334, without negligence on the part of the defendant company, a horse wandered upon a trestle; an engine and tender upon which the plaintiff was fireman, struck the horse and were derailed, injuring the plaintiff. There was no brake upon the engine and the plaintiff contended, that though in a sense the horse caused the derailment, yet it was for the jury to say whether, if there had been a brake on the engine, it would not have probably prevented the engine from hitting the horse. The defendant insisted that the absence of brakes on the engine was not the proximate cause of the injury, but that the presence of the horse on the trestle was the proximate cause of the derailment and that as the company was not guilty of any negligence in connection with the horse being upon the track, the defendant could not be held responsible.

This court said in an opinion by Mr. Justice Peckham:

> "We think this claim is unfounded, and that the proximate cause of the injury within the meaning of the law was the absence of the brakes on the en-

gine. *At any rate, there was evidence which made it a question for the jury to say whether the accident would have happened if there had been brakes on the engine in good order and fit use.*

"It may be assumed that there was no negligence on the part of the defendant by reason of which the horse came upon the trestle, and that it was not, therefore, responsible for any damage of which the horse was the sole and proximate cause. *We think one proximate cause of the accident was the absence of the engine brakes.* The purpose of a brake is to stop the engine more promptly than can be done without it, and if there had been a brake on the engine it would, if used, have probably prevented the accident. At any rate, there was evidence to that effect. The absence of a brake which, if present, would have prevented the accident, was, therefore, a proximate cause thereof. If an obstacle on the track which necessitates the using of the brake is to be regarded as the sole proximate cause of an accident which occurs only because there was no brake on the engine, the result would be that the company would never be liable, no matter what its negligence in not providing effective brakes, so long as its own negligence did not cause the presence of the obstacle on the track. This can not be true.

"*The obstacle is one of the things which caused the necessity to use the brake, and it is the neglect of the company in not furnishing the brake which constitutes an immediate and proximate cause of the injury.*"

It is apparent that in the last mentioned case, the court applied the test of *causa sine qua non*, sometimes spoken of as the "but for rule," when it declared it was a question for the jury to say "*whether the accident would have happened if there had been brakes on the engine, in good order and fit for use.*" To paraphrase this quotation, it was for the jury to say "whether the accident would have happened but for the absence of brakes on the engine."

In M'Donald vs. Toledo R. R., 74 Fed. 104, it appeared that snow had fallen in the City of Toledo, Ohio, and drifted at the intersection of two streets to a depth of four feet; one of the streets was occupied by the tracks of the defendant company. The company caused the snow to be removed from the tracks and piled in an irregular and conical mass to a depth of from four to six feet on either side of its tracks and between the tracks and the curbstones of the street. The plaintiff was driving past a car standing on the tracks and had ample space to pass around the track without impediment. The defendant started the car causing a noise which frightened plaintiff's horses so that they ran over one of the piles of snow upsetting the buggy and injuring the plaintiff. The plaintiff set forth these facts in his petition and the court below sustained a demurrer thereto. On appeal to the Circuit Court of Appeals, the judgment of the lower court was reversed. Mr. Justice Lurton in rendering the opinion of the Appellate Court, decided first, that the facts set forth in the plaintiff's petition showed no negligence on the part of the defendant in starting its car and frightening the plaintiff's horses and then proceeds to consider the allegation in the petition "but for" the defendant's negligence in piling the snow the buggy would not have been overturned.

> "The learned Circuit Court judge was of the opinion that if it were conceded that the piling of the snow in the street in the manner described, was negligence, it was not the proximate cause of the accident. As we have before stated, the averments of the declaration make a case where two causes combined to produce the catastrophe, each measurably independent of the other. If the horses of the plaintiff had not become frightened he would probably have sustained no injury. That they were frightened and suddenly started or swerved so as to carry his buggy onto this

pile of hardened snow was, as we have seen, not the culpable fault of the defendant. Neither was the plaintiff at fault. * * * What, then, was the connection between his injury and the negligence of the defendant in thus obstructing the street? *He avers, and this on demurrer must be taken as true, that but for the presence of this mass of snow he would have been able to have controlled his horses and prevented any injury. If this be true, then this mass of snow which ought not to have been where it was, and was only there through the negligence of the defendant, was a cause which if it had not existed, the plaintiff's buggy would not have been overturned and he would have sustained no injury. If, therefore, the negligence of the company was not the causa causans it was the causa sine qua non, whether it was cause without which the accident would not have happened is a question of fact, unless the circumstances appearing demonstrate that the causal connection was not proximate."*

In Shugart vs. Atlanta, etc., R. R., 133 Fed., 505, the action was for the death of a railroad fireman caused by the derailment of an engine on which he was working. The plaintiff contended that the derailment was caused by the defective condition of the track. The defendant contended that the proximate cause of the accident was the negligence of the engineer, a fellow servant of the deceased, in running the train with the tender in front of the engine at an excessive speed. The court said:

"The bad condition of the tracks may not have been the sole cause of the accident, *but if it was a cause without which the derailment would not have happened then it is a contributing cause. A cause without which the derailment would not have occurred is necessarily a proximate cause, although other causes may have co-operated in bringing it about.* * * * *It was a question for the jury.*"

See also Patton vs. Southern R. R., 82 Fed., 984; Opinion by Justice Brawley, the late Chief Justice Fuller, concurring.

"Where an injury is the combined result of the negligence of the defendant and an accident for which neither the plaintiff nor the defendant is responsible, *the defendant must pay damages unless the injury would have happened if he had not been negligent*. The Indiana Appellate Court, speaking through New, Justice, stated the rule thus and supported it by a great citation of authorities; 'The true rule is that where two causes combine to produce an injury such as is here charged and complained of, both of which causes are proximate in their character, the one being the result of culpable negligence and the other an occurrence as to which neither party is at fault, *the negligent party is liable provided the injury would not have been sustained but for such negligence*.'"

Thompson on Neg., Par. 68.

Applying the test of *causa sine qua non* to the present case, it is certain that *but for* the negligence of the defendant in leaving open the inside door, the deceased's head would not have been crushed by the projecting wall. It cannot be said that viewing the evidence in its most favorable light to the plaintiff, all reasonable men must conclude Pennington's head would have been crushed by the projecting wall, *but for* this negligent failure of the defendant's servant to obey his master's rule and keep his arm across the open door. Viewed in the same light and applying the same rule, would all reasonable men of necessity find that Pennington's head would have been crushed *but for* the projection of the concrete wall into the elevator shaft, which according to plaintiff's expert was unsafe construction? Would all reasonable men of necessity find that *but for* the absence of a fender on the projecting wall,

the deceased's head would have been crushed? In other words, the defendant's negligence in failing to keep the door closed was certainly a *causa sine qua non*. The negligent disobedience of his servant in failing to keep his arm across the door was probably a *causa sine qua non* and the negligent and unsafe projection of the wall and the negligent omission to provide fenders sufficiently *causa sine qua non* to have warranted the submission of the case to the jury.

IV.

Injury to Passengers Was a Probable Consequence of Defendant's Negligence.

The defendant's principal contention is, that even if his negligence was a cause without which the deceased would not have been killed, the law will exonerate him on the ground that injury to the deceased was not a probable consequence of such negligence. As we understand the cases cited under the last sub-section the true test of proximate cause is, whether the accident would have happened *but for* the defendant's negligence. If, however, the test of probable consequence be applied, what meaning should be attached to the word probable?

> "'Probable,' both in testing the duty to use care and in the alleged rule as to causation, does not mean more likely than not, but rather not unlikely; or, more definitely, such a chance of harm as would induce a prudent man not to run the risk; such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen. Mr. Watson (Damages for Personal Injuries, Sec. 33) substitutes 'possible of occurrence' for the phrase 'likely to occur.' Shearman & Redfield use the words 'reasonably possible' instead of 'probable.'"
>
> Harvard L. R., Vol. 25, p. 117.

See also,
33 Can. L. J., 717.
9 Col. L. R., 139.

In Atchison, etc., Railway Co. vs. Calhoun, 213 U. S., 9, this court said:

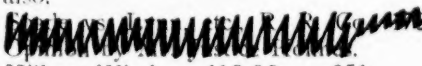
> "But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences *which can reasonably be anticipated by the utmost foresight.*"

In applying the rule of reasonable anticipation by the utmost foresight, it is well settled by this court that it is not necessary, in order to hold the defendant liable, that he anticipate the precise manner in which the harm would occur, nor the exact nature of the harm, nor its full extent.

In Washington, etc. Railroad Co. vs. Hickey, 166 U. S., 526, the plaintiff suffered an injury while a passenger on the defendant's street car. The driver of the car saw a train approaching, but as the railroad gates were up, endeavored to cross the track. While the car was upon the track the steam railroad closed the gates, preventing the defendant's car from crossing. The plaintiff contended that the negligence of the defendant's driver in endeavoring to cross the steam railroad tracks in front of the train, was a proximate cause of the injury. The defendant contended that its driver could not reasonably anticipate that the gates would be lowered, and that as the horse car could have crossed without injury to the plaintiff had not the gates been lowered, the proximate cause of the injury was the lowering of the gates by the steam railroad company. This court in the folowing language, pointed out the error in the defendant's contention.

"The apparent liability to accident, if any delay should occur from any cause whatever, was plain, and such fact would support a finding of negligence in attempting to cross before the steam car train had passed. *In such case it would be no excuse that the particular cause of a possible or probable delay, viz., the lowering of the gates, was not anticipated.* The important fact was that *there existed a possibility of delay,* and therefore, of very great danger, and *that danger ought to have been anticipated and avoided.* A delay might be occasioned at that time by an almost infinite number of causes; the horses might stumble, the harness might give way, the car might jump the track; a hundred different things might happen which would lead to a delay, and hence to the probability of an accident. *It was not necessary that the driver should foresee the very thing itself which did cause the delay. The material thing for him to foresee was the possibility of a delay from any cause, and this he ought naturally to think of,* and a failure to do so, and an attempt to cross the tracks, might be found by the jury to be negligence, even though he would have succeeded in getting across safely on the particular occasion if it had not been for the action of the gate-keeper in wrongfully lowering the gates.

See also,



Hill vs. Windsor, 118 Mass., 251.

If the so-called probable consequence test, urged by the defendant, be applied in the case now before the court the question will be, whether, by the utmost foresight the defendant could reasonably anticipate that a concrete wall without fenders, projecting into an elevator shaft, or the omission to close the inside door, or the disobedience of his servant in failing to keep his arm across the open door, might result in injury to a passenger. In other words, ex-

ercising the utmost foresight, should the operator of a passenger elevator reasonably anticipate that any part of a passenger's body may extend beyond the confines of the elevator car. An elevator travels vertically, often at a varying and high rate of speed. It is sometimes crowded and sometimes contains a single passenger; it carries the young and the aged, the afflicted and the healthy; its passengers have no seat and nothing with which to steady themselves. The dangers that lurk for passengers in this mode of transportation are so well recognized by the courts as to require the highest degree of care and extraordinary vigilance in their construction, maintenance and operation. Why are fenders used upon projections into elevator shafts, why are inside collapsible doors provided and, where a car is constructed an unusual distance from the elevator, why are regulations passed by municipalities requiring such doors to be upon elevator cars, why do the constructors of elevators place thereon emergency switches to instantly stop the car, why did this defendant have a rule of his own requiring the elevator boys to keep their arms extended across the open door unless there existed a well recognized danger of passenger's bodies extending beyond the car? With the law reports teeming with cases involving injuries to passengers upon elevators, with the courts uniting in declaring that the great danger necessitates the highest degree of care, with constructors of elevator shafts providing fenders upon projections, the builders of elevators providing inside collapsible doors and emergency switches, and municipalities undertaking to compel the use of such doors where the elevator is an unusual distance from the shaft, and the defendant in this specific case providing by a rule of his own for the arms of the operators to be across the door, can it be contended that in the exercise of the utmost foresight the defendant

should not have reasonably anticipated the possibility that some part of Pennington's body might accidentally extend beyond the car limits?

The construction of the particular elevator in this case with an inside collapsible door, the rule of the defendant which it was continually endeavoring to enforce, show, not merely that there is a condition which would warrant a jury in finding that the defendant should reasonably anticipate some part of a passenger's body getting beyond the car limit, but that it was continually anticipated, expected and endeavored to be provided against until, but not at the time of this accident. But contends the defendant, though Pennington would not have been killed but for our negligence, we did not foresee the exact accident and therefore this court should relieve us from responsibility for our negligence. As was said in the Hickey case, *supra*, the delay might be occasioned by an almost infinite number of causes and it was not necessary that the driver should foresee the very thing itself which caused the delay, so in this case a passenger's body might get beyond the limits of the car from an almost infinite number of causes and the law will not absolve the defendant from liability because he did not foresee the very thing itself which caused Pennington's body to extend beyond the car. A peril similar to that which befell Pennington might arise from sickness, the infirmities of age, the inattention of youth, dizziness from swift vertical travelling, the jolting of the car, changes in its speed, the stopping thereof, its crowded condition, the movements of other passengers, or some other accidental cause, all of which should reasonably be anticipated. If the defendant should, by the utmost foresight, have reasonably anticipated a passenger's body extending beyond the car, he is not exonerated because he did not anticipate the precise cause therof. If the de-

fendant by the utmost foresight should have reasonably anticipated that a passenger might fall while in the car, he is not exonerated because it is impossible to prove the precise cause of Pennington's fall. The fall of a passenger in an elevator is sufficiently frequent to constitute a substantial appreciable risk of which the defendant in the exercise of the highest care should be aware and take extraordinary vigilance to prevent harm from resulting therefrom.

V.

The Facts in This Case Present No Opportunity for the Application of the Nearest Wrong Doer Rule.

The last or nearest wrong doer rule of which Dr. Wharton is an especial advocate is in substance as follows: The logical cause is the last or (nearest) *culpable* human actor to be found in the chain of antecedents; *i. e.*, the one, acting last before, or (nearest) to, the happening of the damage to plaintiff. It is well illustrated by the case of Cole vs. German, etc., Society, 124 Fed., 113, where subsequent to the defendant's negligence a trespasser by his independent and wilful act opened the door leading to an elevator shaft and induced the plaintiff to walk in, causing the injury, and by the case of Teis vs. Smuggler Mining Co. 158 Fed., 260, where after the defendant's negligence had rendered the plaintiff unconscious, third parties carelessly dumped the plaintiff in an elevator leaving his leg unnecessarily protruding, and by the case of Atchison vs. Calhoun, 213 U. S., p. 1, where after the plaintiff had safely arrived on the defendant's platform a third person attempted to throw him on a rapidly moving train. In the case at bar no act whatsoever of a third party intervened,

much less did the negligent act of a third party intervene so as to insulate the defendant's negligence. The utmost that can be contended for by the defendant is that an accident, in reference to which he does not even suggest Pennington to have been guilty of contributory negligence, concurred with the defendant's negligence in producing an injury. Under such circumstances, it is clearly a question for the jury. Thompson on Neg., Par. 68. Thus, in M'Donald vs. Railroad, 74 Fed., 106, "two causes combined to produce the catastrophe, each measurably independent of the other," the one was the accidental frightening of the plaintiff's horse, the other was the defendant's negligence in having previously to the accident piled snow in the street. So in Holloway vs. U. S., 191, U. S., 339, the accident was the combined result of the accidental presence of the horse upon the trestle, occurring subsequently to the defendant's negligent omission to provide the brake. See also Patton vs. Railroad, 82 Fed., 984.

Where the defendant's negligence is a proximate cause of the injury in combination with an accident occurring without contributory negligence on the part of the plaintiff, the condition is logically the same as where the negligence of two independent persons combine to produce the catastrophe, each as a proximate cause thereof, under which conditions the liability of either person is clearly recognized, as in the case of Hickey vs. Railroad, 166 U. S., 521, where the negligence of a steam railroad and the defendant, a street railroad, combined to produce the injury. See also Shugart vs. Railroad, 133 Fed., 505, where the negligence of a felow-servant and the railroad combined to produce the injury and the railroad was held responsible.

VI.

Defendant's Negligence Concurred With the Accident and Was Therefore Proximate and Not Remote.

The defendant contends that its negligence in projecting the concrete wall into the shaft, its negligence in failing to provide fenders therefor, its negligence in failing to close the door and its negligence in failing to keep the elevator boy's arm across the open door preceded in point of time the accidental falling of Pennington in the elevator and that Lord Bacon's maxim of *causa remota, sed proxima, spectatur* should be applied to relieve the defendant from the consequence of his negligence. Were it true that Pennington's fall was nearer in time or space to the injury than was defendant's negligence, since the squib case it would not relieve him from the consequence of his negligence because this maxim is not literally construed. The fact is, however, that the defendant's negligence concurred with the fall because it was a continuing negligence, growing out of a continuing duty of the defendant towards Pennington while he was a passenger to exercise the highest care for his protection. It is true that months before the accident the defendant negligently constructed its elevator shaft and that a few seconds before the accident his servant failed to close the door and at a lesser period of time his servant failed to have his arm across the door, but the defendant cannot relieve himself of the obligation to exercise the highest care at every moment while Pennington was a passenger by claiming that he accomplished his negligence before Pennington completed his journey.

VII.

Federal Cases on Proximate Cause Relied Upon by Defendant.

The facts in the Federal cases relied upon by the defendant differ so widely from those of the case at bar, that it may be well before considering them in detail to refer to a recent expression of this court upon the question of proximate cause, wherein it is pointed out that though the rules of law are reasonably well settled, slight differences of fact are of such great importance as to render an examination of the numerous decisions of little value.

> "Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. *It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance.* The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life."
>
> Atchison, etc., Railway Co. vs. Calhoun, 213 U. S., 7.

The last mentioned case, upon which the defendant lays much stress, is a good example of the cases from which he endeavors to draw an analogy. The facts were as follows: the plaintiff, a child of about three years, and his mother were passengers upon the defendant's train; on arriving at their destination the station was not announced, but, on inquiry, the plaintiff's mother learned where she was from other passengers and started to alight. By the time she reached the platform of the car the train started, and she handed the plaintiff to a Mr. Robinson, who was then upon the platform of the station. He warned her not to alight as the car was running too rapidly, and passed

the plaintiff to his son, whereupon another boy grabbed the child from Robinson's son and ran along with the car which was moving with increased rapidity and attempted unsuccessfully to return the plaintiff to his mother. The last boy ran between 75 to 100 feet to the end of the station platform and stumbled over a baggage truck which had been left at the very end of the platform, thereby losing hold of the plaintiff who fell under the car and was injured. The station platform was dimly lighted and no employe of the defendant warned the plaintiff's mother not to leave the car, nor rendered her or the plaintiff any assistance. It was contended on behalf of the plaintiff that the defendant was negligent, first, in failing to announce the station, in not stopping the train for a reasonable length of time, in failing to warn them not to leave the train, and in not rendering them any assistance; secondly, in dimly lighting the platform and in permitting the truck to remain at the very end thereof. The trial court instructed the jury that as the plaintiff had been safely taken from the train to the station platform there could only be a recovery by reason of what happened after that time and permitted the case to go to the jury only upon the second ground of negligence contended for by the plaintiff. This court expressly refused to determine whether it would have been proper to have left the case to the jury on the first ground contended for by the plaintiff and said that question was not before the court; the only question being whether the trial court was right in submitting the case to the jury, whether the defendant was guilty of negligence in leaving the truck at the very end of the platform, and whether that was the proximate cause of the injury. The court said:

> *"It is not necessary for us to consider whether the original neglect of the defendant could properly have been found by the jury to have been the cause of the*

plaintiff's injury. The defendant's contention that the jury was permitted to find a verdict on that ground cannot be sustained. The charge to the jury makes this clear, * * * *Leaving entirely out of view, then, the original carelessness of the defendant*, we come to the real issue, which was submitted to the jury upon which alone its verdict can stand. Was the company guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and did that condition directly and proximately cause the injury. It cannot be doubted that the conduct of Jones was careless in the extreme, though doubtless the motives which impelled him were good. * * * There is no doubt that the act of Jones and the act of the defendant in respect to the truck concurred in causing the injury, *and we assume that if the defendant failed in its duty by leaving the truck at the end of the wooden platform*, the verdict can be sustained * * *.

"In judging of the defendant's conduct, attention must be paid to the place where the truck was left. *If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad*. On the other hand, if it had be left a mile from the station, where by no reasonable hypothesis passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station 100 feet, more or less, in length. *The truck was left at the very end of this platform with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck*. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. *No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a*

distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidily, much less that a person would take a helpless infant and while thus running attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed."

See Tex., etc., R. R. vs. Stewart, 228 U. S., 363.

In Scheffer vs. Railroad, 105 U. S., 429, the railroad injured a man. He subsequently became insane and then committed suicide. This court held that the railroad was not responsible for his suicide. No comment is needed to differentiate this case from the case at bar.

In Cole vs. German Savings & Loan Society, 124 Fed., 113, the plaintiff was injured by the independent, wilful act of a trespasser which insulated the defendant's acts and omissions from the plaintiff's hurt. A trespasser unconnected with the defendant, by his conduct invited the plaintiff to step into an open elevator shaft. The court said:

"It goes without saying that the injury to the plaintiff was the natural and probable consequence of the act of the trespasser who preceded the plaintiff to the elevator, opened the door of the well, and stepped back, thus inviting her to pass into the shaft. No one can contemplate this act for a moment without a clear conviction that the fall and the injury were its natural and probable result. This act was, therefore, a proximate cause of the injury—an act of negligence which formed the basis for an action for damages against the strange boy who committed it."

"Not only this, but there is no evidence that the accident and injury to the plaintiff resulted from these acts or omissions of the defendant, but positive and convincing testimony that they were produced by the wrongful act of another."

"The wrongful act of this trespasser *was not com-*

mitted in operating or in attempting to operate, the elevator, in riding or visiting upon it, or in doing any act which he had ever done before. He had never opened the door into the empty well and invited a patron of the elevator to step into it before this accident occurred. How could any one reasonably anticipate he would be guility of such an act." * * *

"The act of the strange boy was a violation of the law. It was a trespass upon the property and upon the rights of the defendant. The defendant could not foresee or reasonably anticipate it, and it was not required to anticipate or to provide for, violations of the law and trespasses upon its property by its fellow-citizens."

In conclusion the court said:

"The independent, voluntary act of the strange boy who opened the door of the elevator and invited the plaintiff to enter the well, was incapable of anticipation * * *. It broke the chain of causation between the prior negligence of the defendant and the injury of the plaintiff, insulated the defendant's acts and omissions from the plaintiff's hurt, and *imposed upon the boy who willed and committed the act which produced the injury the sole liability for the damage which resulted from it."*

In Teis vs. Smuggler, etc., Co., 158 Fed., 260, the court held that the defendant was not liable for the conduct of persons not his agents and in no way acting for him, who, in rescuing the plaintiff from a mine where he had been rendered unconscious by the accumulation of gas, carelessly dumped the plaintiff in an elevator, leaving his leg unnecessarily protruding beyond the same, whereby it was broken by coming in contact with the wall of the elevator shaft.

"Whenever this casual connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force

> or human agency acting independently of the first negligent act, but for which the ultimate injury would not have come, the former is remote and the latter the proximate cause."

The Cole case and the Teis case presented facts eminently fitted for the doctrine there applied, to wit: that the interposition of an independent, voluntary act between the defendant's negligence and the injury insulates the defendant's negligence.

In the case of the Empire, etc., Co. vs. Atchison, 135 Fed., 135, the plaintiff's cattle were injured by a flood, in reference to which the court said:

> "It was of such unprecedented nature and character in its height, suddenness and destructive force as to constitute what is known as an act of God, admits neither of dispute nor argument."

In Butts vs. Railway, 110 Fed., 329, the plaintiff contended that he was entitled to go to the jury both upon the question as to whether the defendant had allowed him a reasonable time to change from one car of a train to another before cutting the train, and secondly, on account of the defendant's trainman calling to the plaintiff, "Look out! Look out!" without giving notice as to the danger against which he was being called upon to guard himself. The court said:

> "But the separation was not made until after every passenger had left the car to be cut out, and after *the plaintiff had, in fact, reached a place of safety upon the car* in which he was to continue his journey. * * * He knew the car he came out of was to be cut out. * * * ***The trouble is, he did not use his head, he neither reflected or looked about him, he did what he should not have done and took the only possible course attended with danger.***

In Chicago, etc., Railway Company vs. Elliott, 55 Fed., 949, the facts were, the plaintiff was riding in the caboose of a train in charge of cattle in the cars thereof. Before reaching a station, where he knew it was usual to change cabooses, he asked the conductor whether a change would be made. He was answered in the negative, and told that as the train would only stop a few moments he would have no time to examine his stock. On reaching the station, however, he got off, walked forward, and examined several cars of the stock. He then turned back, but the train having already started, he feared he would be unable to board the caboose and climbed upon the stock car, walking backward along the top of the train. Before he reached the caboose the train stopped for the purpose of changing the caboose. The caboose was kicked off from the train just as the plaintiff was stepping upon it, causing him to fall to the track where his foot was crushed by a wheel. ***Held that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury.***

In Goodlander vs. Oil Co., 63 Fed., 400, the consignee of oil, for whom the defendant was not responsible, permitted oil to run into the plaintiff's engine, where it exploded and destroyed the plaintiff's mill. The plaintiff endeavored to hold responsible the carrier of the oil because of his alleged negligence in not providing a valve regulating the outflow of oil. The court said:

> "It may be said that it was the duty of the shipper so to equip the car that its contents might be safely discharged in ordinary methods and by the exercise of due care. This we may concede. *It was a duty, however, growing out of the contract and owing to the consignee;* and for failure therein the shipper would be liable to the consignee for the damage naturally and proximately flowing from such failure: *that duty,*

however, was not owing to the plaintiff, the material being shipped not being in and of itself essentially dangerous."

The plaintiff submits that a third person trying to throw a baby on a train (Atchison vs. Calhoun); a trespasser inviting a lady into an open elevator shaft (Cole vs. The German Savings & Loan Society); a third person placing the plaintiff in an elevator so that his legs hung over the sides thereof (Teis vs. Smuggler Mining Company); an unprecedented flood that amounted to an act of God (Empire State Cattle Company vs. Atchison); the conduct of a passenger doing, without reflection or using his head, just what he ought not to have done (Butts vs. The Railway); a man walking backward along the top of a train (Chicago, etc., R. R. vs. Elliott); the action of a third party in permitting oil to run into plaintiff's mill (Goodlander vs. Standard Oil Company), and the negligent signal of a fellow-servant (American Bridge Co. vs. Seeds), are not merely slight circumstances differentiating the appellant's cases from the case at bar, but so widely different as to warrant the inference that the appellant is indeed compelled to depend upon cases of little or no relevancy.

The case of Zopfi vs. Postal, etc., Co., was twice in the U. S. Circuit Court of Appeals. See 60 Fed., 987, and 73 Fed., 610. The first opinion was rendered by Mr. Justice Key. The plaintiff in the Zopfi case was not a passenger and the defendant owed her no special duty either by common or statutory law. The court, in the following language, pointed out that the cases referred to by plaintiff's counsel in the Zopfi case were cases where a duty had been imposed either by common statutory or municipal law upon the defendant, and therefore, had no analogy with the Zopfi case:

> "The other cases referred to by the plaintiff's counsel have no analogy with the present case that makes them of authority in this decision. They arise in cases in which the law, either municipal, statutory, or common, impose duties upon persons or corporations which their failure to observe and perform resulted in the injuries for which the suit was brought."

In the case now before the court the defendant did owe a special duty by virtue of common law to the plaintiff, a duty to exercise the highest care. The facts in the Zopfi case appear more fully in the opinion in 73 Fed., 610, which was delivered by Mr. Justice Lurton. The plaintiff contended that she slipped and fell by reason of a telegraph pole which the defendant negligently permitted to lie close to a platform upon which she was accustomed to step on her way to school. The plaintiff did not step on the pole, nor did her foot touch it as she stepped over it to the platform. The court held that it was a case proper to go to the jury and instructed the jury that in order for the plaintiff to recover it was not necessary that the pole be the sole cause of her fall, but, if the jury found from all the facts and circumstances that the pole proximately and efficiently contributed in co-operation with the wet platform to her fall, then, though the pole was not the *causa causans*, it would be a cause without which the fall would probably not have occurred and the defendant would be clearly liable, and cite with approval M'Donald vs. Railway Co., 74 Fed., 104. Mr. Justice Lurton, speaking for the court, said:

> "Still, the fact remains that the facts and circumstances were such that either of two inferences might be made—one that the wet platform was the sole cause of her fall; the other, that the pole proximately and efficiently contributed in co-operation with the wet platform, to her fall. *If the jury should be of the*

opinion from all the facts, that but for the pole she would probably not have fallen, then, though the pole was not the causa causans, it would be a cause without which the fall would probably not have occurred. Upon such a finding the liability of the plaintiff in error would be clear"

Conclusion.

The plaintiff contends that the decisions in the Holloway case, 191 U. S., 339; the Hayes case, 111 U. S., 228; the M'Donald case, 74 Fed., 106, and the Shugart case, 133 Fed., 506, hereinbefore cited, are conclusive of the case at bar. In the Holloway case, but for the absence of the brakes on the engine, in all probability the horse on the trestle would not have derailed the engine. In the Hayes case, if a hole in the fence had not left the same open, the boy might not have gone upon the tracks and been injured, even though the boy upon the train had beckoned to him so to do. In the M'Donald case, if the snow had not been negligently left in the street, the buggy would not likely have been overturned, even though the plaintiff's horses, without negligence upon the part of the defendant, became accidentally frightened. In the Shugart case, if the tracks had not been in a dangerous condition, the engine would probably not have been derailed, even though the fellow-servant of the plaintiff negligently ran the tender in front of the engine at an excessive speed. In the case at bar, had the door been closed the accidental fall of Pennington would certainly not have killed him and probably not have injured him. If the elevator boy's arm had been extended across the door, probably Pennington would neither have been injured nor killed. It was a question for the jury to say, whether, if the concrete wall had not projected into the shaft, Pennington would have been

killed. It was for the jury to say, whether, if there had been a fender upon the concrete wall, Pennington would have been killed.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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